Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JACKIE SANDERS

Petitioner,

v.

EXXON CORPORATION d/b/a
EXXON COMPANY, U.S.A.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Prior to *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), the District Court and the Fifth Circuit, respectively, granted and affirmed summary judgment for Respondent on Petitioner's Title VII and 42 U.S.C. § 1981 retaliation claims.

Are the lower court opinions consistent with *Reeves*?

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OPINIONS BELOW

The District Court granted summary judgment and entered Final Judgment for Exxon on May 10, 1999. The unpublished District Court Memorandum and Order granting summary judgment appears in Appendix A. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court's judgment appears at *Sanders v. Exxon Corp.*, 210 F.3d 369 (5th Cir. 2000) (unpublished) and in Appendix B. The Fifth Circuit's denial of Ms. Sanders' Petition for Rehearing *En Banc* appears in Appendix C.

JURISDICTION

On May 10. 1999, the District Court entered Final Judgment for Exxon, from which Jackie Sanders timely appealed. *See* Appendix C. On February 18, 2000, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's Final Judgment. *Sanders v. Exxon Corp.*, 210 F.3d 369 (5th Cir. 2000); Appendix B. On April 5, 2000, the Fifth Circuit denied Jackie Sanders' Petition for Rehearing *En Banc*. *See* Appendix A.This Petition for Writ of Certiorari is filed within ninety days of the Fifth Circuit's denial of the Petition for Rehearing *En Banc*. Therefore, the Court has jurisdiction pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C § 2000e-3 (1994)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training, or retraining, including on-

the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 1981a (c)(1) (1994)

If a complaining party seeks compensatory or punitive damages under this section—any party may demand a trial by jury

STATEMENT OF THE CASE

Jackie Sanders filed suit against Exxon Corporation on November 26, 1997, alleging that, in violation of Title VII and 42 U.S.C. § 1981, the company had retaliated against her for opposing its race discrimination against minority employees. Sanders requested a jury trial.

Although the parties vigorously contested numerous material facts, the District Court granted Exxon summary judgment on all Sanders' claims. The Fifth Circuit summarily affirmed. The question before the Court is whether, in the light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), a jury, not a judge, should have resolved the substantive factual disputes.

Several facts are undisputed. Jackie Sanders worked for Exxon as an oil and gas accountant and accounting supervisor from 1977 to 1997. Prior to 1995, Exxon promoted Sanders five times and considered her one of its "highest potential" employees.[1]

From April, 1995 to November, 1995 Ms. Sanders — then a Senior Revenue Accounting Supervisor in Exxon USA's Controllers division — repeatedly opposed her supervisor, Gary Schott's, discrimination against minority accountants. Ms. Sanders—a white female—repeatedly confronted Schott about the disproportionately low performance rankings of the minority accountants under his supervision and his failure to accord them high-profile assignments and promotional opportunities. A 1996 Exxon EEO investigation substantiated Sanders' allegation concerning the minority rankings, finding that the minority accountants under Schott's supervision were ranked, on average, **25 points** below their white counterparts.[2]

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[1] R 1/978, Exhibit N, at 79.

[2] R 2/2 (referencing Exxon's sealed EEO report). At Exxon, an employee's ranking

In November, 1995—shortly after Sanders objected to Schott's demand that she write a negative performance evaluation for an Asian-American accountant under her supervision—Exxon removed Sanders from her supervisory position and transferred her to an unchallenging, non-supervisory position in Upstream Financial Services ("UFS") that had previously been filled by entry-level employees.[3] In September, 1996—less than one month after Sanders protested her demotion and the underlying race discrimination to Exxon management and filed a Charge of Discrimination with the EEOC—Exxon declared Sanders psychologically unfit for work and placed her on medical leave.[4]

After Sanders returned from medical leave in December, 1996 and, over Exxon's Controller's objections, continued to cooperate with the EEOC,[5] Exxon management—acting pursuant to the Controller's directive[6]—repeatedly subjected Sanders to **"hard counseling"** for alleged performance problems[7]; stripped her of a special assignment on which she was doing a "great job"[8]; and accelerated deadlines for her to complete her work.[9] Then, in July, 1997—less than three weeks after Sanders rejected Exxon's offer to settle her EEOC Charge[10]—Exxon management, despite knowing of Sanders' continuing depression,[11] once again subjected her to a "hard counseling" session that reduced her to tears and caused her to become ill.[12] Having debilitated Sanders, Exxon once again declared her psychologically unfit for work and placed her on medical leave.[13] Suffering from depression and Post-Traumatic Stress caused by Exxon's demotion and long-term harassment, Sanders resigned her employment on October 17, 1997.

After exhausting her administrative remedies, Sanders sued Exxon under Title VII, 42 U.S.C. § 1981, alleging that the company had demoted and constructively discharged her in retaliation for opposing its race discrimination internally and filing a Charge of Discrimination with the EEOC.[14] Although it conceded that Sanders had opposed, in good faith, its

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determines her eligibility for salary increases and promotions, as well as lay-offs.

[3] R 1/915 (and related Exhibit 2); R 2/Exhibit I; R 2/Exhibit K; R 1/857-858

[4] R 1/915.

[5] Sanders provided the EEOC with substantial statistical data demonstrating that Exxon had ranked the minority accountants under Schott's supervision disproportionately lower than their white counterparts. R 1/1056-1057.

[6] R 1/854; R 1 978, Exhibit N, at 213, 215 (emphasis added).

[7] R 1 913.

[8] R 1/914; R 1 978, Exhibit O, at 121.

[9] R 2/Exhibit A, at 446-447.

[10] R 1/1056-1057.

[11] R 2/Exhibit I(2).

[12] R 1 912.

[13] R 1/912.

[14] Sanders also alleged that Exxon subjected her to the intentional infliction of emotional

allegedly discriminatory employment practices, Exxon denied subjecting Sanders to any unlawful retaliation and claimed that all of its actions towards Sanders were benign and motivated by its concern for her well-being.

Despite the parties' conflicting evidence, the District Court granted Exxon's Motion for Summary Judgment. The District Court found that Sanders had opposed, in good faith, Exxon's alleged employment discrimination and assumed *arguendo* that Exxon had subsequently demoted her. However, the District Court summarily concluded that Sanders' opposition to Schott's discrimination did not "cause" her demotion, despite an Exxon EEO investigation that found that Schott **"jointly"** decided to transfer Sanders from her supervisory position.[15] The District Court likewise concluded that, despite Sanders' evidence of demotion, reduced pay increases,[16] and persistent harassment by Exxon management, Sanders had not raised a fact issue that a reasonable person in her position would have felt compelled to resign.

In a one-line *per curiam* opinion, the Fifth Circuit summarily affirmed the District Court's judgment. The Fifth Circuit similarly denied Sanders' petition for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This case presents, in the summary judgment context, the issues addressed in *Reeves v. Sanderson Pluming Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000). *Reeves* held that lower courts err by failing to credit the employee's *prima facie* case and evidence challenging the employer's "legitimate, non-discriminatory reasons" in determining, as a matter of law, that the employee failed to prove Title VII discrimination. Lower courts further err by crediting the employer's self-serving testimony, when such testimony is impeached or contradicted, and by failing to draw all reasonable factual inferences in favor of the employee. In this case, the District Court and the Fifth Circuit—acting prior to *Reeves*—applied the very mistaken standard that the Fifth Circuit earlier used, and this Court invalidated, in *Reeves*. Therefore, the Court should vacate and remand those decisions for reconsideration in the light of *Reeves*.

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distress, in violation of Texas law.

[15] R 1/847 (emphasis added).

[16] In the three year period after she opposed Exxon's discrimination, Sanders' average annual raise **decreased** from $5,500.00 to approximately $600.00, while the average annual raise for similarly situated Exxon Controllers employees **increased** from $4,100.00 to $6,700.00. R 1/911.

I. THE DISTRICT COURT AND THE FIFTH CIRCUIT IGNORED CRITICAL EVIDENCE INDICATING THAT EXXON DEMOTED AND CONSTRUCTIVELY DISCHARGED JACKIE SANDERS IN RETALIATION FOR HER OPPOSITION TO THE COMPANY'S DISCRIMINATION

Reeves established that, on summary judgment in Title VII cases, lower courts must credit the employee's evidence establishing a *prima facie* case of discrimination and challenging the employer's "legitimate, non-discriminatory reasons" for the alleged adverse employment action. *Reeves*, 68 U.S.L.W. at 4484. Here, as in *Reeves*, the District Court failed to credit Sanders' evidence that Exxon demoted and constructively discharged her for opposing its alleged discrimination and her evidence establishing that Exxon's proffered reasons for these adverse actions were false.

With respect to Sanders' retaliatory demotion claim, the District Court failed to credit Sanders' evidence—derived from an Exxon internal EEO report—that her supervisor, Gary Schott, "jointly" decided to remove Sanders from her supervisory position within six months of her first opposition to his alleged discrimination. The District Court further failed to credit Sanders' evidence demonstrating that Exxon's professed "business reasons" for transferring her to UFS—that Sanders was having "interpersonal problems with some of her subordinates" and had long sought such a transfer—were false and, therefore, pretexts for retaliation. Such evidence included glowing testimonials from Sanders' former subordinates[17]; Sanders' repeated requests not to be transferred to UFS in 1995[18]; and Exxon's failure to transfer a similarly situated Revenue Accounting supervisor (Darrell Call), whose conduct towards his subordinates had resulted in negative employment evaluations and a Title VII lawsuit against the company for sex and race discrimination.[19]

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[17] Sanders' subordinates testified that she was an "excellent supervisor" who was "smart" and "professional"; and, further, that Sanders "gave them a chance" and would not stand for them being mistreated in any way. R 2/101, Exhibit F, Exhibit N, and Exhibit M.

[18] Sanders requested that she not be transferred to UFS in June, 1995 and, again, in November, 1995 because of her concern that its overtime requirements would have prevented her from caring for her mother, who was recuperating from a series of strokes. R 1/917; R 4/353, Exhibit 1, at 132-133, 209, 212-214. In light of Sanders' family situation, Exxon allowed her to remain in Revenue Accounting in June, 1995 but declined to do so in November, 1995.

[19] R 1/1083 (sealed Exhibit B and Exhibit C). Exxon did not dispute Call's sordid work history and offered no explanation for why it transferred Sanders, instead of him.

With respect to her retaliatory constructive discharge claim, the District Court failed to credit Sanders' *prima facie* case.[20] Specifically, the District Court failed to credit Sanders' demotion, the related reduction in job responsibilities, the menial and degrading nature of her new position, and her decreased pay raises. The District Court's failure to credit such evidence allowed it to summarily conclude that "[a]lthough Sanders appeared to be genuinely distressed and may have been rudely treated on a few occasions, the incidents she relates would not have caused a reasonable person to resign."[21]

II. THE DISTRICT COURT IMPERMISSIBLY CREDITED THE SELF-SERVING, CONTROVERTED TESTIMONY OF EXXON MANAGEMENT

Reeves also established clear and important limitations on the extent to which lower courts could rely upon the moving party's controverted evidence in adjudicating FRCP 56 motions for summary judgment. The Court held:

> [T]he court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the non-movant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' *Reeves*, 68 U.S.L.W. at 4484 (citations omitted).

In granting Exxon summary judgment, the District Court relied almost exclusively on controverted affidavits from Exxon management.

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[20] In *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994), the Fifth Circuit held that, in order to establish a *prima facie* case of constructive discharge under Title VII, an employee need only "offer evidence that the employer made the employee's working conditions so intolerable that a reasonable person would feel compelled to resign." To determine whether a reasonable person would have felt compelled to resign, the Fifth Circuit stated that the following factors should be considered, either "singly or in combination":

1. demotion;
2. reduction in salary;
3. reduction in job responsibilities;
4. reassignment to menial or degrading work;
5. reassignment to work under a younger supervisor;
6. badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; and
7. offers of early retirement

[21] *See* Appendix A, at 18a.

For example, in support of its conclusion that Exxon did not harass and constructively discharge Sanders, the District Court noted:

> Affidavits or deposition testimony from Templeton [Exxon USA Controllers, Planning and Controls Manager], Brittan [Exxon USA Controllers, UFS Manager], Hayes [Exxon USA Controllers, Human Resources], and Lawhorn [Exxon Nurse] indicates that they acted out of concern for Sanders' emotional health, and — most importantly — upon the orders of Sanders physicians."[22]

Indeed, the District Court adopted, almost verbatim, the self-serving affidavit testimony of Peggy Brittan—Sanders' supervisor in UFS and her primary tormentor—regarding a July 31, 1997 "hard counseling" session that caused Sanders to suffer an emotional breakdown and led Exxon to, once again, bar her from the workplace.[23] The District Court credited Ms.

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[22] *See* Appendix A, at 14a.

[23] In her affidavit, Ms. Brittan testified:

> On July 31, 1997 I counseled with Ms. Sanders regarding a deadline that was missed when she was out sick during the week of July 14, 1997...My purpose was to discuss with Ms. Sanders how we might ensure that no other deadlines were missed like one that occurred while she was out. During this discussion Ms. Sanders became very emotional and cried. Ms. Sanders continued to bring up the allegations surrounding her claims of discrimination by Mr. Schott. I reminded her several times that she was talking about things that I had no knowledge of. She made comments that being at work was a problem and that no one had tried to help her. I reminded her that she had been offered a position in another organization and she had turned the offer down. At the end of the conversation I offered to get a taxi for Ms. Sanders, but she refused. I asked Ms. Sanders to take a few minutes to compose herself before driving herself home. Following my meeting with Ms. Sanders, I prepared detailed notes of my conversation with her. Attached as Exhibit C are true and correct copies of the notes I prepared from my conversation with Ms. Sanders on July 31, 1997. *See* Exxon's Motion for Summary Judgment, Affidavit of Peggy L. Brittan.

In its Memorandum and Order, the District Court described the July 31, 1997 meeting as follows:

> In July, 1997, Sanders missed a deadline while she was out on sick leave for a few days. On July 31, 1997, after Sanders returned to work, Brittan initiated a discussion with her about the missed deadline and tried to discuss ways to avoid missing deadlines in the future. During the discussion, Sanders became very emotional and cried. Sanders made statements like "Exxon is killing me," "I have to look over my shoulder all the time," "I'm unable to work; I'm too upset," I'm sick, but you say it's a performance problem," and "no one will help me." She said she had sought help but there was no resolution of her issues, which she said were "eating her up" and that she was only sleeping two hours a night. Sanders continued to bring up her allegations regarding Gary Schott. Brittan reminded Sanders several times that she was talking about things Brittan had no knowledge

Brittan's self-serving testimony, despite the fact that it was not only controverted by Sanders' affidavit[24] but also contradicted by the deposition testimony of Exxon's nurse, Elizabeth Lawhorn. For example, Lawhorn testified that Brittan was "coming down hard" on Sanders for some time prior to the July, 1997 "hard counseling" session; that Brittan's inability to "move on" resulted in her abusive treatment of Sanders during that counseling session; and that Brittan herself was "part of the problem."[25] The District Court's failure to disregard Exxon's officials' self-serving testimony about their "concern" for Sanders' well-being, especially in the face of such countervailing evidence, is inconsistent with *Reeves*.

III. THE DISTRICT COURT DREW ALL REASONABLE FACTUAL INFERENCES IN FAVOR OF EXXON AND AGAINST JACKIE SANDERS

Finally, in *Reeves*, the Court made clear that, in adjudicating summary judgment motions in Title VII cases, lower courts must draw all reasonable factual inferences from an employee's direct evidence of discrimination in favor of the employee and may not make credibility determinations or weigh the evidence. *Reeves*, 68 U.S.L.W. at 4484. Here, as in *Reeves*, Jackie Sanders adduced direct evidence of Exxon's discrimination, which the District Court either failed to credit or discounted. Such evidence consisted of the following statements made by Exxon's Controller, Bobby Alexander, during a September 17, 1996 meeting with Sanders to discuss her discrimination allegations:

> Alexander: "Look, we don't discriminate against anybody for any reason at all. And when somebody comes along, like yourself or anyone else, that insists that we do, of course we are not going to be happy with them.
>
> * * *
>
> Alexander: If you would trust me, your career would not be screwed up. Now, I'll be the first to admit, I think you are screwing your career up. But it's not too late to stop and turn it around.

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of, and tried to direct the conversation back to the deadline issue. Brittan told Sanders that "other people's lives are not your business." Sanders became so emotional that Brittan tried to convince her to take a cab home, and asked her to at least wait about 10 minutes to compose herself before attempting to drive. *See* Appendix A, at 6a.

[24] In her affidavit, Sanders testified that Brittan berated her at length on July 31, 1997, over a deadline allegedly missed two weeks before and that, when she tried to escape Brittan's tirade, the latter blocked her from leaving the office. R 1/912.

[25] R 1/978, Exhibit P, at 91-92, 153-154.

* * *

Sanders: I talked to the lawyer, I know what's in Title VII. I know what I'm entitled to.

Alexander: What are you entitled to?

Sanders: I'm entitled to the difference between my salary now and what I'm going to make out on the outside.

Alexander: Why are you entitled to the difference between your salary and what you're going to make on the outside?

Sanders: Because that's what Title VII says.

Alexander: And what is Title VII?

Sanders: Title VII is the Equal Employment Opportunity Act that Congress passed.

Alexander: You better—you better get you another lawyer.

* * *

Alexander: We're trying to work with you. You go down to the EEOC and talk to some lawyer who you don't know, who does not know you...[H]e doesn't know anything about the situation other than what you've told him. And you believe him when he says, 'Let me tell you what you're entitled to, Jackie'?

Sanders: Who am I supposed to believe?

Alexander: I would think you would believe us a heck of a lot more—you know, we're part of your family, not him?

Sanders: You're darn right. You were part of my family. You just don't know how much until now.

Alexander: That's what we're trying to do. But you keep—you keep throwing—you keep going against us.

* * *

Alexander: You're out there talking to a lawyer at EEOC—How many times do you think we've been challenged on discrimination?...How many times has anyone demonstrated that we've discriminated against them?

* * *

Alexander: You can take it to the EEOC. And you can take it to court. And we'll see who wins.

Sanders: That's not what I want to do.

Alexander: Well, you know you do want to do that.

Sanders: No. No, Bobby. I don't want to go to court.

Alexander: Well, that's exactly what you're doing.[26]

Although a jury could conclude from these statements that Mr. Alexander — the highest ranking official in Exxon USA Controllers — was attempting to intimidate and coerce Ms. Sanders regarding her EEOC Charge, the District Court summarily concluded:

> It is doubtful that the above comments, taken in context with the entire conversation, could be construed as 'intimidation' or a 'threat' to force Sanders to drop her EEOC Charge."[27]

Additionally, as the Fifth Circuit did in *Reeves*, the District Court discounted Alexander's remarks because it summarily concluded—contrary to the clear record—that Alexander "did not make any 'ultimate employment decision' regarding Sanders."[28]

Finally, the District Court discounted, as direct evidence of retaliation, Alexander's actions and statements regarding Sanders' December, 1996 request to transfer from UFS to a more challenging position. In light of Sanders' qualifications and her emotional state, Exxon management and Human Resource officials regarded a transfer as essential to her survival at Exxon and had recommended to Alexander that he approve her request.[29] Alexander rejected this recommendation and instructed his subordinates to notify Sanders that any transfer would leave a "mark" on her career.[30] Simultaneously, Alexander directed his subordinates to begin subjecting Sanders to "hard counseling," not to "bow" to her, and to "make sure she understands facts."[31]

Faced with this Hobson's Choice, Sanders declined tbe transfer offer that Alexander's subordinates presented her in January, 1997. She argued that, viewed in the context of Alexander's other coercive and intimidating remarks, the transfer "offer" constituted further evidence of Exxon's retaliation. Contrary to *Reeves*, the District Court completely failed to credit Alexander's directive that Exxon management subject Sanders to "hard counseling." Likewise at variance with *Reeves*, the District Court resolved all reasonable inferences against Sanders by holding that Alexander's contemporaneous directive that any transfer

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[26] R R 1/866-872.
[27] Appendix A, at 16a.
[28] Appendix A, at 16a.
[29] R 1/978, Exhibit N, at 212-213.
[30] R 1/854; R 1/978, Exhibit N, at 213, 215.
[31] *Id.* (emphasis original).

would leave a "mark" on her career "does not appear to be a 'threat' but a **legitimate opinion** about corporate perceptions."[32]

CONCLUSION

Because the lower courts failed to apply the *Reeves* standard for summary judgment motions in Title VII cases, the Court should grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in the light of *Reeves*.

Respectfully submitted,

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[32] Appendix A. at 18a (emphasis added).

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JACKIE SANDERS,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO. H-97-3885
EXXON CORPORATION d/b/a	§	
EXXON COMPANY, U.S.A.,	§	
	§	
Defendant	§	

MEMORANDUM AND ORDER

Pending before the Court is Defendant Exxon Corporation's motion for summary judgment (Dkt. #37) on all the claims asserted by Plaintiff Jackie Sanders. After reviewing the motion, the parties' briefing the record and the applicable law, the Court is of the opinion that Exxon's motion should be GRANTED.

I. Factual and Procedural Background

Exxon hired Jackie Sanders in September 1977. Sanders worked for Exxon for 20 years before resigning her employment on October 16, 1997. In April 1995, Sanders was a supervisor over approximately 10 to 15 accountants in Revenue Accounting East ("***RAE***") within the controller's department. Sanders, who is white, claims that Exxon demoted her to a "dead - end staff position" in November 1995 because she expressed concerns to her supervisor, Gary Schott, in April 1995 and June 1995 that the black, Asian and Hispanic accountants under her supervision were being discriminated against in the company's annual ranking process. Sanders further claims that she was transferred because she refused in October 1995 to lower an Asian employee's evaluation at Schott's direction.

The new position to which Sanders was transferred was the "Crude and Condensate" ("***C&C***") desk in Upstream Financial Services ("***UFS***"). Sanders confirmed in her deposition testimony that her salary and

classification level remained the same after the transfer, she continued to receive pay raises after the transfer, and her ranking within the company remained largely the same.[1] The parties disagree as to who was involved in the decision to transfer Sanders and as to whether the C&C job was beneath Sanders' abilities or constituted a demotion.

During 1996, Sanders began to show signs of stress and depression. In April 1996, Sanders consulted a nurse in Exxon's health department and asked to have her blood pressure checked. Sanders stated that she sometimes felt that her "heart was racing" and that she was feeling "exhausted and pressured" and was not sleeping well due to working long hours at work and spending every weekend caring for her sick mother in San Antonio. The Exxon nurse advised Sanders to see a physician regarding medication to help her sleep, and also suggested that Sanders make an appointment with Exxon's employee assistance program for stress counseling. Sanders testified that during this time she was "depressed" and tended to keep her office door shut and not talk to anyone. She testified that she was not handling things well, not sleeping well, and suffering from stress, anxiety and crying.

In May 1996, Sanders went to see David Middlebrooks, her manager at UFS. Sanders secretly tape - recorded this conversation. The transcript, which Sanders confirmed was accurate, shows that Sanders was very upset and crying. She told Middlebrooks that there was an unspecified "problem" in her former unit, but refused to be more specific, even though Middlebrooks expressed concern and asked her repeatedly to explain. When Sanders told him she was unhappy working in UFS, Middlebrooks offered to move Sanders out of UFS, but Sanders declined the offer. During the conversation, in response to Sanders' comment that she needed someone she could trust, Middlebrooks agreed and remarked that she needed a "soul mate" to confide in. Sanders testified that she was very offended by this comment and interpreted it to mean that he was telling her to "get a mate" in her life.

During June and July of 1996, Sanders testified that her depression was affecting her ability to do her job, and that she "wasn't taking care of myself or my clothes." She testified that she was having "anxiety attacks" and that "everything seemed suspicious" to her - she was afraid her phone

[1] Sanders had received a relative performance ranking of 60 percent while working in UFS. Her ranking for the period April 1994 to March 1996 remained at 60 percent, largely because of positive comments from Schott regarding the period he supervised her before her transfer. However, Sanders' ranking for the period April 1996 to March 1997 dropped to 50 percent.

was being bugged and that someone was following her in the park, and she thought something was in the air making her ill. She testified that her family was tired of hearing about her problems at Exxon, because that was all she talked about. Her brother urged her to get therapy.

On August 16, 1996, after she had been working in her new position in UFS for nine months, Sanders approached Sheila Templeton, RAE manager, and asked why she had been transferred from RAE to UFS nine months earlier, and asked whether she had been transferred for refusing to lower the Asian employee's evaluation in October 1995 as instructed by her supervisor, Gary Schott. Sanders was viably upset and crying. Templeton said she had not known that Sanders was unhappy at UFS, and she explained the reasons for the November 1995 transfer - that Sanders had previously expressed an interest in a financial position, that Templeton thought the position would be a good opportunity for Sanders, that Sanders' need to take care of her mother on weekends could be accommodated in the new position, and that there were some conflicts in the unit Sanders had been supervising in RAE. Sanders made some vague allegations involving Gary Schott, but was reluctant to elaborate. Templeton encouraged Sanders to speak to human resources about the allegations, and, with Sanders' consent, set up a meeting for a few days later, August 20, 1996, between Templeton, Sanders and human resources advisor Jack Hayes. After Sanders left, Templeton called Sanders' supervisor, Dan Jones, and asked him to check on Sanders because she was so upset.

On August 19, 1996, Sanders' UFS manager, Peggy Brittan, called a nurse in Exxon's health department and expressed concern about Sanders, stating that Sanders appeared to be overreacting to work issues and blowing small incidents out of proportion, and that Sanders was not able to deal with criticism of her work. Brittan told the nurse that Sanders could be under stress because she "works all week then drives to San Antonio for the weekend to care for her ill mother." The nurse suggested that Brittan talk to Sanders. express concerns about her health and offer for her to be evaluated by the health services department.

On August 20, 1996, Sanders had the scheduled meeting with Templeton and human resources advisor Jack Hayes. Sanders, visibly upset, complained that Exxon had discriminated the minority accountants formerly under her supervision in RAE, and claimed that she had been transferred to UFS in December 1995, nine months before, in retaliation for her previous complaints to her former supervisor, Gary Schott. During the meeting on August 20, 1996, Sanders was extremely upset and was crying

uncontrollably. She told Templeton and Hayes that she believed that Schott "systematically worked to drop minorities in the rank list." She stated that she had not been able to concentrate and had been making numerous errors in her work. She said she feared for her life because she lived alone and knew Schott's brother was a policeman; she was afraid Schott would "kill her" if he knew of her allegations against him. Templeton and Hayes told Sanders that her allegations were very serious and that they would be investigated. Hayes and Templeton reported Sanders' allegations to Bobby Alexander, controller for Exxon Company U.S.A. On August 28, 1996, Alexander wrote a memo asking Tom Walters in human resources to conduct an investigation into Sanders' allegations.

On August 30, 1996, Sanders filed an EEOC charge alleging that Exxon had retaliated her for having opposed discrimination against the minority accountants.

On September 10, 1996, Hayes contacted Liz Lawhorn, a registered nurse and occupational health coordinator in the health services department, and expressed his concern that Sanders had been very emotional and crying during a September 4 interview with HR representatives, and that she had later been seen "in the corner of the room shaking." The next day, Lawhorn visited Sanders privately in Sanders' office. Lawhorn told Sanders she was concerned about Sanders' emotions and ability to work. Sanders appeared sad and distressed and told Lawhorn that she was "unable to work without crying" and that she believed she had a problem. Lawhorn testified that Sanders told her that "she really appreciated me coming to her and offering assistance because she felt she didn't have anywhere to turn." Lawhorn told Sanders to take sick leave and to call her physician as soon as possible for evaluation. Lawhorn testified that Exxon policy is that, when the medical department believes that an employee may be medically unfit for duty, the employee is asked to be evaluated by a physician for fitness for duty. Sanders was evaluated by her own physician, Dr. Kevin Comfort, on September 19, 1996. Dr. Comfort diagnosed Sanders with "Stress Disorder - Acute" and stated that she was disabled and unable to work until October 7, 1996. Sanders went on paid medical leave.

On September 17, 1996, Sanders, while on medical leave, came up to the Exxon office and spoke to Bobby Alexander. Sanders alleges that Alexander expressed displeasure with her for filing the EEOC charge and stated that she was going against her Exxon "family." She admits, however, that Alexander told her repeatedly that Exxon would investigate

her allegations and would not tolerate discrimination. He wrote down the names of the alleged discrimination victims and told Sanders he would personally go and look at the rankings. In addition, when Sanders stated that she was not happy working her current assignment in UFS, Alexander offered to transfer Sanders to another section of the company or to an affiliate if she wished. In this conversation, which Sanders also tape-recorded, Sanders seems to be upset and crying; Alexander tells her several times to "calm down."

The next day, on September 18, 1996, Lawhorn called Sanders and informed her of Exxon's procedure that employees on medical leave should not come back to the office until released back to work by a physician. Lawhorn also informed Sanders of the Exxon procedure that if she came back to work without having a medical release that she would be escorted off the premises. Sanders was offended by these procedures, but presents no evidence indicating that these procedures were not uniformly applied to all employees on medical leave.

On October 7, 1996, Lawhorn received a work status evaluation form from Dr. John Peake, a psychiatrist, who diagnosed Sanders with "Major Depressive Disorder - Single Episode," and stated that Sanders would be unable to work for a few more weeks. On October 27, 1996, Sanders returned to work, having been cleared by Dr. Peake to do so.[2]

Meanwhile, the human resources investigation into Sanders' allegations had been proceeding. The investigation team interviewed several employees, including Sanders, and examined the rankings to see where minority employees were ranked compared to non-minority employees. On October 18, 1996, the investigation team reported to Alexander its conclusion that the allegations that Gary Schott had intentionally discriminated against minority employees and retaliated against Sanders were unfounded. The investigation team did note that the average ranking of minority employees in the controller's department in 1995 and 1996 was 26 and 31, as compared to the average ranking of non-minority employees, 52 and 56. The team recommended that the controller's department should pay closer attention to the distribution of minority employees in its annual ranking list, and identify areas where training may be needed to address performance problems.

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[2] Sanders confirmed in her deposition testimony that Dr. Comfort and Dr. Peake were not chosen by Exxon, but were her own physicians, and that she believed they had her best interest in mind when making their diagnoses. She also testified that she agreed with her doctors' opinions that she was unfit for work during this time.

After Sanders returned to work, Lawhorn in the medical department occasionally spoke to Sanders about her medical situation and how she was handling her return to work. Sanders' manager, Peggy Brittan, consulted Lawhorn in December 1996 about whether it would be appropriate to have a regular performance discussion with Sanders. Lawhorn replied that Sanders had no work restrictions and that there was no reason not to conduct the performance discussion. Also in December 1996, Hayes and Templeton informed Sanders that the investigation team had completed its review, that recommendations were made and that action was taken, but they declined to discuss the details with her. When Sanders stated again that she was unhappy at UFS, Hayes and Templeton again offered to transfer her to another position, but Sanders refused.

In 1997, Sanders continued to work at the C&C desk. Brittan periodically counseled Sanders regarding errors in her work, problems with coworkers and a missed deadline. Sanders complains about several February 1997 counseling sessions in which Brittan engaged her in pointed discussion about her performance problems and threatened to call the medical department again and have her examined because of her emotional state. Sanders contends Brittan was harassing her in retaliation for her protected activity, but she admitted in her deposition that she was having problems in her job at that time and was making mistakes and had gotten upset and cried in another meeting with Brittan a few days before.

In July 1997, Sanders missed a deadline while she was out on sick leave for a few days. On July 31, 1997, after Sanders returned to work, Brittan initiated a discussion with her about the missed deadline and tried to discuss ways to avoid missing deadlines in the future. During the discussion, Sanders become very emotional and cried. Sanders made statements like "Exxon is killing me," "I have to look over my shoulder all the time," "I'm unable to return to work; I'm too upset," "I'm sick, but you say it's a performance problem," and "no one will help me." She said she had sought help but that there was no resolution of her issues, which she said were "eating her up" and that she was only sleeping two hours a night. Sanders continued to bring up her allegations regarding Gary Schott. Brittan reminded Sanders several times that she was talking about things Brittan had no knowledge of, and tried to direct the conversation back to the deadline issue. Brittan told Sanders that "other people's lives are not your business." Sanders became so emotional that Brittan tried to convince her to take a cab home, and asked her to at least wait about 10 minutes to compose herself before attempting to drive. That evening, Sanders testified, she sought treatment at a hospital emergency room and talked to

the nurses there for about an hour, but left when the nurses said they wanted to admit her to the hospital.

After the July 31 meeting, Brittan again contacted Lawhorn in the medical department regarding Sanders' emotional state, and Lawhorn met with Sanders in the morning on August 5, 1997. During this meeting, Sanders was very emotional and stated her belief that Exxon was trying to get rid of her. She was very upset about Brittan's criticism of her work. Lawhorn placed Sanders on disability leave until she could be evaluated by a physician. Sanders went back to her desk and did not want to leave the office, but Brittan told her that she had been placed on medical leave and that if she did not leave the office Brittan would call security or the medical department. The parties disagree about whether Lawhorn insisted that Sanders be evaluated by a physician "chosen by Exxon." At any rate, Sanders remained on medical leave and was evaluated by her own psychiatrist, Dr. Peake, who diagnosed her with "Major Depressive Disorder" on August 28, 1997 and opined that she was disabled and unable to work until October 15, 1997. Sanders testified that she agreed with Dr. Peake's conclusion that her emotional state made her unfit for work during this time.

Sanders remained on medical leave until October 16, 1997, when she arrived at Exxon's medical department and declared her intention to resign. Lawhorn and Hayes tried to convince Sanders not to resign, and again offered to transfer her away from UFS if she so desired, but Sanders declined the offer and insisted on submitting her resignation.

II. Summary Judgment Standard

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam). The movant bears the initial burden of informing the court of the basis for its motion, and of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Calrett*, 477 U.S. 317, 323 (1986). The movant who is a defendant may discharge its burden by pointing out an absence of proof on any one of the essential elements of the plaintiff s claim. *Celotex*, 477 U.S. at 325. Once the movant has done so, the burden shifts to the non-movant to designate specific facts showing that summary judgment should not be granted. *Id.* at 321-25; *Wallace v. Texas*

Tech. Univ., 80 F. 3d 1042, 1047 (5th Cir. 1996). When considering a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant. *See Samuel v. Holmes*, 138 F.3d 173, 176 (5th Cir. 1998); *Texas v. Thompson*, 70 F.3d 390, 392 (5th Cir. 1995). The non-movant does not satisfy her burden with "some metaphysical doubt as to the material facts," by "conclusory allegations," by "unsubstantiated assertions," or by only a "scintilla of evidence." *Little*, 37 F.3d at 1075. Only a genuine dispute over a material fact - one capable of affecting the outcome under existing law - will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see also Hanchey v. Energas Co.*, 925 F.2d 96, 97 (5th Cir. 1990) (fact issue must be "outcome determinative").

IV. Discussion

Sanders alleges Title VII retaliation, retaliation under 42 U.S. C. § 1981, and intentional infliction of emotional distress under Texas law.

1. Title VII Retaliation

Sanders alleges that Exxon retaliated against her in violation of Title VII because she complained that Exxon was discriminating against the minority accountants under her supervision, and because she filed an EEOC charge. Sanders does not allege that Exxon discriminated against her personally, only that it discriminated against other employees and retaliated against her when she opposed that discrimination.

Title VII imposes liability for unlawful retaliation where (1) the employee engaged in activity protected by Title VII; (2) the employer took adverse employment action against the employee; and (3) a causal connection exists between that protected activity and the adverse employment action. *See Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F. 3d 364, 372 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 798 (1999). The ultimate determination in a Title VII retaliation case is whether, "but for" the protected conduct, the employer would not have engaged in the adverse employment action. *Id.*

Activities protected by Title VII fall into two broad categories - opposition and participation. An employee has engaged in protected activity when she has (1) "opposed any practice made an unlawful employment practice" by Title VII or (2) "made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding or hearing" under Title VII.

Id. Sanders claim protection under both the opposition and participation clauses. She claims that she opposed discrimination by complaining to Schott in April 1995 that an Asian accountant she supervised was ranked too low and should be ranked higher. Sanders claims that Schott disagreed and remarked that the employee was not very aggressive and was very quiet and "that was the way the Vietnamese are." Sanders argued that the employee should not be penalized because of her "culture." In June 1995, after the employee rank fist became available, Sanders complained to Schott that the minority employees in her unit were not being treated fairly and that they were all "on the bottom of the rank fist." She said Schott told her that the lower rankings for the minority employees were not a problem because the list would be merged with the ranking list in another unit, and the distribution would "average out." In October 1995, Sanders and Schott had a disagreement about the Asian employee's evaluation; Schott told Sanders to mark the employee "below most" and add comments explaining the employee's low ranking as was required by Exxon policy, but Sanders refused to follow Schott's instructions because she believed the employee's low ranking was due to discrimination. Sanders' opinion was that any negative comments about the employee's performance would be "a lie." The evaluation was ultimately not changed because Sanders had - again, contrary to Exxon policy - already discussed the evaluation with the employee before it was finalized.

Sanders, to prevail on her retaliation claim, does not have to prove the merits of her allegations that Exxon discriminated against these employees. Sanders must prove only that she had a reasonable belief that her opposition to discrimination was valid. *See, e.g., Long v. Eastfield College*, 88 F.3d 300, 304 (5th Cir. 1996) (holding that the opposition clause of 42 U.S.C. § 2000e-3(a) requires the plaintiff employee to demonstrate that she had at least a reasonable belief that the practices she opposed were unlawful). The Court has reviewed the briefing and summary judgment evidence regarding Sanders' allegations, and concludes that Sanders has at least raised a genuine issue of material fact on whether she had a reasonable belief that discrimination was occurring. However, the issue of whether any minority employee has or had a viable claim of discrimination against Exxon is not before this Court.

In retaliation for her "opposition," Sanders alleges, Schott "repeatedly undermined [her] supervisory authority" and "had her removed

as a supervisor and reassigned to a dead-end staff position in another area of the company." This allegation refers to Sanders' transfer to UFS in November 1995.

Sanders also alleges that she opposed discrimination by making an "internal complaint" of discrimination and retaliation to Templeton and Hayes in August 1996. She claims protection under the "participation" clause because she filed an EEOC charge in August 1996.

In retaliation for this additional opposition and participation, Sanders alleges that Exxon "contrived to have [her] removed from her job and placed on medical leave." She also alleges that Alexander, controller of Exxon U.S.A., "attempted to intimidate and threaten her: "Alexander admonished [her] that she was 'screwing [her] career up' and accused her of betraying the Exxon 'family' by consulting with legal counsel and filing a Charge of Discrimination with the EEOC," Sanders alleges.

Sanders finally contends that, from October 1996 to October 1997, Exxon "systematically badgered, harassed, and humiliated her in a calculated effort to destabilize her psychologically and make her quit," resulting in her constructive discharge on October 16, 1997.

The Fifth Circuit has repeatedly held that "Title VII was deigned to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *See, e.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), *cert. denied*, 118 S. Ct. 336 (1997). "Ultimate employment decisions" include acts "such as hiring, granting leave, discharging, promoting, and compensating." *Id.*

Exxon argues that Sanders has not alleged an ultimate employment decision. The Court agrees that Sanders has alleged many minor incidents that she characterizes as "retaliation," which are clearly not "ultimate employment decisions" but the "interlocutory or mediate decisions" that *Mattern* holds non-actionable.[3] However, the Court will assume *arguendo*

[3] For example, Sanders claims, *inter alia*, that Schott "undermined her authority" by not inviting her to meetings and forcing her to apologize to one of her employees. She also complaints that Middlebrooks told her she needed a "soul mate," that an Exxon attorney (who is black) improperly asked her to sign an interrogatory verification in an unrelated legal matter before the answers were drafted, that Middlebrooks refused to let her leave work on day to seek treatment for an infected eye, that she was ordered not to be on Exxon premises while on medical leave and was escorted out of the office, that she was "counseled" harshly for minor mistakes in her work, that she was threatened with another transfer (out of UFS) if she took leave to take care of her ill mother, that the only interesting

that Exxon's decision to transfer Sanders to UFS[4] and its decision to place Sanders on medical leave were "ultimate employment decisions." The Court also notes that constructive discharge, if proven, can be an ultimate employment decision.

A. Transfer to UFS in November 1995

Thus, the Court turns to the question of whether Exxon's transfer of Sanders to the UFS position in November 1995 was retaliatory. Viewing the facts in the light most favorable to Sanders, the Court will summarize the evidence regarding the UFS transfer. Sheila Templeton, who became Sanders' manager in RAE in April 1995, testified that the RAE accounting supervisor positions such as the one Sanders held in 1995 were by nature "rotational" positions and were not permanent assignments. Thus, there were other employees waiting to rotate into RAE supervisory positions. Sanders recognized the rotational nature of the RAE supervisor positions in her deposition. In addition, Sanders testified that she "had always wanted" to be assigned to UFS and had filled out a form expressing interest in such a position. Sanders testified that when a fellow RAE supervisor, Diane Saxon, was transferred to UFS in 1993, Sanders told Schott that she also wanted to be transferred to UFS because it was considered to be a prestigious place to work. Templeton testified that she identified Sanders as a good candidate for a UFS position that was open in June 1995, because Sanders had good analytical skills and could develop professionally by

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duties in her UFS job were taken away from her, that Exxon refused to divulge details of its investigation into her allegations of discrimination, that UFS employees contracted her at home during her medical leave, that Exxon medical staff contacted her physician without her permission, and that Exxon tried to require her to see a physician "chosen by Exxon." None of these actions are "ultimate employment decisions," and therefore they cannot on their own support a claim of Title VII retaliation. *See Mattern*, 104 F.3d at 707-09 (noting that none of the following are ultimate employment decisions: hostility or "staring" from fellow employees, having tools stolen, a supervisor's visit to the employee's home, a verbal threat of termination, a reprimand, being placed on "final warning," refusing the employee permission to attend a conference, giving employee false information, criticizing the employee's work to a vendor, delayed receipt of a reimbursement check, deleting the employee's data from a form, criticizing an employee's EEOC complaining); *see also Messer v. Meno*, 130 F.3d 130, 139-40 (5th Cir. 1997) (holding that employer's actions – including failure to resolve employee's internal grievance, monitoring her conversations, criticism of her work and conduct, ignoring her input, denying permission for her to represent the company at certain functions and downsizing her department – were not ultimate decisions), *cert. denied*, 119 S. Ct. 794 (1999).

[4] It is not clear that the transfer to UFS was a materially adverse employment action. *See, e.g., Burger v. Central Apt. Mgt.*, 168 F.3d 875, 879 (5th Cir. 1999) (noting that "a transfer involving no reduction in pay and no more than a minor change in working conditions" is not an ultimate employment action, because "[o]therwise, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like would form the basis of a discrimination suit").

getting financial experience at UFS. So Templeton recommended Sanders for the UFS position in June 1995 and instructed Sanders' supervisor, Schott, to inform her of the transfer. Sanders testified that Schott insisted that the transfer was a "done deal" and told her it would hurt her career to refuse the transfer. Sanders told Templeton that she could not take the UFS job because it would require weekend work, which would conflict with Sanders' obligation to be out of town most weekends to care for her ill mother. "I talked to Sheila about it and told her that I had always wanted to go to UFS; but at this point in time in my fife, I couldn't," Sanders testified. Templeton said she understood Sanders' personal situation and would not require her to transfer to UFS. Sanders asked if refusing the transfer would be a "black mark" on her career, and Templeton assured her that it would not. Jane Beaty, another RAE supervisor, was transferred to UFS instead in June 1995.

In October 1995, another opening came up in UFS. Templeton again considered Sanders for the job. She discussed the job requirements with David Middlebrooks, manager of UFS, and Middlebrooks assured Templeton that the job would have only limited overtime and weekend work so as to not conflict with Sanders' personal responsibilities. Templeton also considered as a factor that Sanders had some interpersonal problems with some of her subordinates and tended to do work herself rather than delegating. In addition, there was another employee returning from a family leave that Templeton wanted to rotate into a RAE supervisor position. Templeton also consulted Sanders' supervisor, Schott, and her own supervisor, Pat Mulva, who agreed to the transfer. Thus, Templeton recommended Sanders for the UFS position, and the personnel subcommittee, of which Templeton was a member, approved the transfer. Templeton told Schott to inform Sanders of the transfer. Sanders testified that Schott "assured me that it was a good opportunity, and they were going to work the issue with my mother. Then I felt comfortable with it because I had always wanted to go to UFS." Sanders testified that when she later became aware that the UFS job was the C&C close-out desk, she was not pleased because she thought the time-sensitive close-out deadlines would conflict with her obligations to her mother. She also introduced evidence to show that the C&C job was not challenging, that it had been filled in the past by entry-level employees, and that several previous holders of the C&C job had since quit Exxon. Exxon submits evidence that the job was important and challenging and had responsibilities that could expand or contract with the qualifications of the employee holding the position. It is undisputed that Sanders' salary and classification remained the same after the transfer.

At any rate, whether or not the transfer was a "demotion," the evidence shows that the people involved in the decision to transfer Sanders to UFS in November 1995 were Sheila Templeton, David Middlebrooks, and to a much lesser extent, Pat Mulva and Gary Schott. Exxon introduces evidence showing that Templeton, Middlebrooks and Mulva did not know in November 1995 that Sanders had complained to Schott about the minority rankings or refused to lower the Asian employee's ranking at Schott's direction. Sanders admits, in her deposition testimony that she has no evidence to show that any of these individuals knew of her opposition activities in October and November 1995. Because Templeton, Middlebrooks and Mulva did not know of Sanders' opposition at the time they participated in the decision, they could not have had retaliatory intent in effecting Sanders' transfer to UFS. *See Watts v. Kroger Co.*, 170 F.3d 505, 1999 WL 147382, at *6 (5th Cir. March 17, 1999) (holding that employer "could not retaliate" plaintiff "because it did not know she has engaged in protected activity"). Schott clearly knew about Sanders' opposition, but the evidence, even viewed most favorably to Sanders, indicates that Schott had only a tangential role, if any, in effecting Sanders' transfer to UFS. Sanders' burden in a Title VII retaliation case is to prove that "but for" her opposition, she would not have suffered the adverse employment action. *See Long v Eastfield College*, 88 F.3d 300, 305 n.4 (5th Cir. 1996). Sanders has not produced enough summary judgment evidence to raise a genuine issue of material fact on the issue of causation. The undisputed evidence indicates that Sanders would have been transferred to UFS "even in the absence of the protected conduct." *Id.* Templeton, who had no knowledge of Sanders' opposition, played the major role in initiating and effecting the transfer, and articulated numerous business reasons for the transfer, prominent among them the fact that Sanders had repeatedly expressed interest in a UFS position. Templeton did not merely "rubber stamp" a recommendation from Schott to transfer Sanders. Thus, even assuming *arguendo* that Schott encouraged the decision to transfer Sanders with a retaliatory motive to punish her for her opposition to discrimination, his small role in the decision still would not establish the required "but-for" causation. *See Long*, 88 F.3d at 306-07 (decision to terminate employee was recommended by supervisor who had knowledge of opposition, but final decision to terminate was made by college president with no knowledge of opposition; court noted that the plaintiff could not show "but-for" causation if the president conducted "his own independent investigation" rather than "rubber stamping" supervisor's recommendation). Accordingly, the Court will grant Exxon's motion for summary judgment regarding Sanders' claim that her November 1995 transfer to UFS was retaliatory.

B. Medical Leave

Sanders alleges that Exxon "contrived" to have her removed from her job and placed on medical leave, apparently in retaliation for her complaints to Templeton and Hayes and her filing of an EEOC charge in August 1996. However, the undisputed evidence, including Sanders' own deposition testimony, indicates that Sanders was suffering from symptoms of depression, stress and anxiety as far back as April 1996, four months before she approached Templeton and Hayes or filed an EEOC charge. Additionally, Sanders confirmed in her deposition testimony that, shortly before she was placed on leave both in 1996 and 1997, she was extremely troubled and emotional, often crying uncontrollably whenever anyone attempted to discuss problems with her work or the state of her health. Affidavits or deposition testimony from Templeton, Brittan, Hayes, and Lawhorn indicates that they acted out of concern for Sanders' emotional health, and - most importantly -- upon the orders of Sanders' physicians. Sanders testified that she, not Exxon, chose Dr. Comfort and Dr. Peake, and that she agreed with their conclusions that she was unfit for work from September 11, 1996 to October 27, 1996, and from August 5, 1997 to October 15, 1997. Sanders has not produced evidence to raise a genuine issue of material fact regarding whether these compelling reasons to place her on medical leave were merely pretexts for retaliation.

C. Alleged threats and intimidation by Alexander

Sanders places great emphasis on several comments made by Bobby Alexander when she met with him shortly after she went on her first medical leave in 1996. Sanders contends that Alexander told her she was "screwing [her] career up" because she had filed the EEOC charge and accused her of betraying her Exxon "family." She claims these comments constitute threats and an attempt to intimidate her into dropping her EEOC charge. Sanders tape-recorded the September 1996 conversation with Alexander, and she attached a transcript of that tape recording to her summary judgment response. When the full conversation is reviewed, it appears that Sanders' complaint takes several of Alexander's comments out of context. The 11-page, single-spaced transcript shows that Alexander tried to calm Sanders down, listened to her detailed story regarding the alleged discrimination and retaliation, asked questions to clarify her allegations, and told her several times that Exxon would not tolerate any discrimination and that her allegations would be investigated. He took down the names of the alleged discrimination victims and promised her he would personally look at the rankings and meet with her again. During this conversation, Alexander also made the following comments:

"Look, we don't discriminate against anybody for any reason at all. And when somebody comes along, like yourself or anyone else, that insists that we do, of course we are not going to be happy with them. I mean, how can you think we would be -- be reasonable."

In response to Sanders' comment that she waited so long to come forward because she "didn't want to ruin her career. And its already screwed up, what little of it I have," Alexander replied, "If you would trust me and listen to me, your career would not be screwed up. Now, I'll be the first to admit I think you're screwing your career up. But it's not too late to stop it and turn it around.

"Now why did you go off and file an EEOC?"

In response to Sanders' statement that an EEOC lawyer had told her about all the damages she was entitled to, Alexander said, "you've got some lawyer out there that does not even have the facts . . about this situation... he doesn't know what he is talking about."

"The point is, you've got a group here at Exxon that thinks a lot of you, but - come on now, don't roll your eyes. We're trying to work with you. You go down to the EEOC and talk to some lawyer who you don't know, who does not know you. He is now - he doesn't know anything about the situation other than what you've told him. And you believe him when he says, 'Let me tell you what you're entitled to, Jackie:

Sanders: "Who am I supposed to believe?"

Alexander: I would think you would believe us a heck of a lot more -- you know, we're part of your family, not him."

Sanders: "You're darn right. You were part of my family. You just don't know how much until now.

Alexander: "That's what we're trying to do. But you keep - you keep throwing - you keep going against us."

"I will look into the facts here. But it's possible we don't agree with you.... You can take it to the EEOC. And you can take it to court. And we will see who wins."

Alexander also commented that it was unlikely that Schott could have single-handedly lowered minority employees' rankings as Sanders alleges, because the ranking process is designed to be a group effort, with input from many supervisors and managers. Alexander also tried to explain the Exxon policy that Sanders violated by refusing to follow Schott's direction to mark "Below Most" on the Asian employee's evaluation:

"[W]e go into a ranking process using the process that is thought through thoroughly, as the one we use, and that employee comes out let's say in the bottom 20 percent, I guarantee you they are 'Below Most.' And it's wrong to go back and tell an employee anything other than the honest truth. On a relative ranking they are in the bottom 15, bottom 20, bottom 10 percent. They are 'Below Most.'"

Sanders: "But I'm forced to make up comments to say why they are 'below most'?"

Alexander: "No. No. No."

Sanders: "Yes. Gary told me to do that."

Alexander: "No."

Sanders: "He forced me to do it."

Alexander: "I guarantee you that if someone ranks in the bottom 10, 15, 20 percent, there are reasons.

It is doubtful that the above comments, taken in context with the entire conversation, could be construed as "intimidation or a "threat" to force Sanders to drop her EEOC charge. Even if Alexander's comments could be construed as a threat, such a threat would not be an "ultimate employment decision" that would support a Tide VII retaliation claim. *See, e.g., Mattern*, 104 F.3d at 708 (noting that "criticizing [an employee's] EEOC charge" or even making "a verbal threat of being fired" does not constitute retaliation). In addition, Alexander did not make any "ultimate employment decision" regarding Sanders. He was not involved in the decisions to transfer her or put her on medical leave. In fact he avers that

he never spoke to her personally again after the above meeting in September 1996. Sanders does not allege that Alexander did anything to "constructively discharge" her during the months leading up to her resignation in October 1997. In fact, she confirmed that Alexander made an offer to move her out of UFS, which she declined. In addition, Alexander avers that he "personally made sure that Ms. Sanders would be welcomed back to Exxon upon her expected return in October, 1997." Accordingly, the Court concludes that Sanders' claim of retaliation based on Alexander's comments cannot withstand summary judgment.

D. Constructive Discharge

"Constructive discharge" is not an independent cause of action, but merely a concept that allows a plaintiff who resigns under certain conditions to nonetheless satisfy the "discharge" element of the applicable cause of action. *See, e.g., Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 925 (5th Cir. 1982). In this case, Sanders must prove constructive discharge to show an "ultimate employment action" to support her claim of Title VII retaliation. "To show constructive discharge, an employee must offer evidence that the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign." *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). A constructive discharge claim requires a "greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." *Landgraf v. USI Film Products*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd*, 511 U.S. 244 (1994). The test is objective, the question is not whether Sanders felt compelled to resign, but whether a reasonable employee would have felt so compelled. *Barrow v. New Orleans Steamship Ass.*, 10 F.3d 292,297 n.19 (5th Cir. 1994).

Sanders alleges that, upon her return from leave in October 1996, "Exxon systematically badgered, harassed, and humiliated her in a calculated effort to destabilize her psychologically and make her quit." However, the summary judgment evidence does not raise a fact issue regarding constructive discharge. In December 1996, Hayes told Sanders that "no one wants you to quit" and that "we are glad to have you back." Sanders complains that she was unhappy in the UFS job and felt like she had been demoted. But she admits that at least seven supervisors and managers offered to help her find a new position at various times during 1996 and 1997, and that each time she received such an offer, she refused it, saying on least one occasion that her UFS job "wasn't a problem." She points to a statement by Alexander, relayed to her by Templeton, that, in Alexander's opinion, her leaving the UFS job would make it appear later

that she had failed in UFS and might leave a "mark" on her career. Because of this comment -- which does not appear to be a "threat" but a legitimate opinion about corporate perceptions -- Sanders chose not to accept a transfer. Sanders claim that in March 1997, her supervisor, Dan Jones, told her that she would be transferred out of UFS if she took leave to care for her mother, so Sanders chose not to take the leave, Sanders complains that the Dataflex duties that she found interesting were taken away from her in March 1997. Finally, Sanders complains that her manager, Brittan, moved up several deadlines to make it difficult for Sanders and "seized upon minor errors in Sanders' work to reprimand her about 'performance issues.'" Sanders also complains about Brittan's criticism of her on July 31, 1997, but Sanders admits that she had missed a deadline, that at the time she was depressed and "hysterical," and that she agreed with her psychiatrist's opinion a few weeks law that she was suffering from major depression and was unfit to work. Sanders alleges that she was "forced" to take medical leave in August 1997, but as discussed above, the evidence shows, and Sanders herself admitted, that she was in fact unfit to work at that time as stated by her own psychiatrist. There is no evidence of any harassment during the two and a half months that Sanders was on medical leave before she resigned. She received full pay during her medical leave. Sanders testified that she did not decide to resign until October 16, 1997, the day she walked into the Exxon medical department and submitted her resignation to Lawhorn and Hayes. She testified that both Lawhorn and Hayes tried to convince her not to resign and that they again offered to transfer her to another position if she desired. When an employer tries to convince the employee not to resign and tries to address the employee's concerns, those actions are by definition not constructive discharge. *See Alvey v. Rayovac*, 922 F. Supp. 1315, 1333 (W.D. Wisc. 1996) (finding no constructive discharge when plaintiff had the option to transfer to another department away from offensive supervisor); *Hammon v. DHL Airways*, 980 F. Supp. 919, 926 (S.D. Ohio 1997) (finding no constructive discharge when supervisors tried to convince plaintiff not to resign and offered to allow him to change supervisors), *aff'd*, 165 F.3d 441 (6th Cir. 1999); *Coffman v. Tracker Marine*, 141 F.3d 1241, 1247 (8th Cir. 1998) (finding no constructive discharge when supervisor tried to prevent employee's resignation and attempted to solve the problem).

The Court concludes based on the summary judgment evidence that Sanders has not raised a genuine issue of material fact on constructive discharge. Although Sanders appeared to be genuinely distressed and may have been rudely treated on a few occasions, the incidents she relates would not have caused a reasonable pawn to reign. *See Coffman*, 141 F.3d at 1247 (holding that dissatisfaction with a work assignment, feelings of

being unfairly criticized, or difficult or unpleasant working conditions, even an environment "tinged with retaliatory acts," are not so intolerable as to compel a reasonable person to resign); *Hammon*, 980 F. Supp. at 926 (holding that "verbal attack" by supervisor was "likely unpleasant" but did not rise to the level of constructive discharge); *Alvey*, 922 F. Supp. at 1333 (holding that difficulty in obtaining information, not being assigned challenging assignments, and unfriendly co-workers did not constitute constructive discharge). Accordingly, because Sanders has not raised a fact issue on constructive discharge, the Court will grant Exxon's motion for summary judgment on Sanders' Title VII retaliation claim.[5]

2. Intentional infliction of emotional distress claim

Sanders asserts a Texas law claim for intentional infliction of emotional distress ("IIED") against Exxon. An IIED plaintiff must prove (1) that the defendant acted intentionally or recklessly; (2) that the conduct was extreme and outrageous; (3) that the actions of the defendant caused the plaintiff emotional distress; and (4) that the emotional distress was severe. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). Whether conduct is "extreme and outrageous" is a question of law appropriate for resolution on summary judgment. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). Conduct is not "extreme and outrageous" unless it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992). Moreover, an IIED claim "will not lie when the acts complained of arise in the employment context, even though the conduct may be deplorable and even though it may rise to the level of illegality." *Thompson v. City of Arlington*, 838 F. Supp. 1137, 1154 (N.D. Tex. 1993); see also *Gearhart v. Eye Care Ctrs. Of Am., Inc.*, 888 F. Supp. 814, 823 (S.D. Tex. 1995) ("Only in the most unusual of cases does the conduct move out of the 'realm of an ordinary employment dispute' into the classification of 'extreme and outrageous....'")

It is clear by an examination of the summary judgment record that the conduct of the Exxon supervisors and managers at issue in this case,

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[5] Sanders also alleges retaliation under 42 U.S.C. section 1981. As Exxon argues, it is not clear whether Sanders has a viable retaliation claim under Section 1981, which prohibits racial discrimination that impairs the right to make and enforce contracts. However, the Court need not reach this question, because any Section 1981 claim would fail for the same reasons as her Title VII retaliation claim. *See Thomas v. Exxon Co., U.S.A.*, 943 F. Supp. 751, 758 (S.D. Tex. 1996) (holding that retaliation claims under Section 1981 and title VII are analyzed under the same framework), *aff'd*, 122 F.3d 1067 (5th Cir. 1997).

even when viewed in the light most favorable to Sanders, does not even remotely approach extreme and outrageous conduct. The Fifth Circuit has held that conduct more severe than what Sanders alleges is not extreme and outrageous as a matter of law. *See, e.g., Ward v. Bechtel Corp.*, 102 F.3d 199, 203 (5th Cir. 1997) (employee subjected to open hostility and physical threats from co-worker); *Atkinson v. Denton Pub. Co.*, 84 F.3d 144, 151 (5th Cir. 1996) (employee subjected to termination, defamation, rudeness). "In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee." *Merrell Dow*, 965 F.2d at 33-34 (granting summary judgment on IIED claim against employee subjected to constant criticism, harassment during psychiatric care, and termination during disability leave). Because Sanders has not raised a fact issue on whether Exxon subjected her to "extreme and outrageous conduct," summary judgment in favor of Exxon is appropriate as to Sanders' IIED claim.

V. Conclusion

Therefore, for the reasons set out in this order, Exxon's motion for summary judgment (Dkt. #37) is GRANTED.

Signed this 7th day of May, 1999.

/s John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20457

JACKIE SANDERS
Plaintiff – Appellant

v.

EXXON CORPORATION, doing business as Exxon Company USA
Defendant - Appellee

Appeals from the United States District Court for the
Southern District of Texas, Houston
(H-97-CV-3885)
February 18, 2000

Before BARKSDALE, BENAVIDES and STEWART, Circuit Judges.

PER CURIAM:*

AFFIRMED. See 5th Cir. R. 47.6

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*Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20457

JACKIE SANDERS
Plaintiff – Appellant

v.

EXXON CORPORATION, doing business as Exxon Company USA
Defendant - Appellee

Appeals from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Opinion 02/18/00, 5 Cir., _____, _____ F.3d _____)

Before BARKSDALE, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35) , the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in

favor (Fed. R. App. and 5th Cir. R. 35) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s Fortunato P. Benavides
United States Circuit Judge

Dated: April 5, 2000

FILED
AUG 11 2000
OFFICE OF THE CLERK

No. 00-69

IN THE
Supreme Court of the United States

JACKIE SANDERS,

Petitioner,

v.

EXXON CORPORATION, d/b/a EXXON COMPANY, U.S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (June 12, 2000), a "pretext plus" case, is applicable to the instant case, which was not decided using that standard. If so, whether *Reeves* could possibly lead to a different result in view of the overwhelming and uncontroverted summary judgment evidence.

CORPORATE DISCLOSURE STATEMENT

Respondent, Exxon Corporation, d/b/a Exxon Company, U.S.A., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Other Authority:

Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* (BNA 3d ed. 1996 & Supp. 1998) 22

STATEMENT OF THE CASE

Petitioner's Statement of the Case omits so many important and uncontroverted facts as to be misleading. Mindful of its obligations under Rule 15.2, Respondent presents a more complete and balanced Statement of the Case.

Petitioner was a supervisor in Respondent's ("Exxon") Revenue Accounting East (RAE) group, a part of the Controller's Department. Petitioner reported to Gary Schott and was responsible for, among other things, helping management evaluate and "rank" the employees under her supervision. (Pet'r Dep. 27-28, 30; R1/919-8.)[1]

According to Petitioner, in April and June 1995 she expressed concern to Schott that certain minorities under her supervision were being discriminated against in the annual ranking process. (R1/918 ¶¶ 6-11.) Also according to Petitioner, in October 1995, Schott — with discriminatory motives — told her to lower a particular minority employee's evaluation, a directive which she says she refused. (R1/916 ¶ 22.)[2] Petitioner

1. Petitioner's deposition is attached as Ex. 1 to Exxon's Memorandum in Support of its Motion for Summary Judgment ("E-MSJ") at Record Volume 4, p. 353 (R4/353). Because all of Defendant's exhibits were filed under seal and do not have record cites, Defendant will refer to some affidavits and exhibits by name. Record excerpts in the Fifth Circuit are referred to by page/paragraph ("ERE x/y"). Exxon Corporation's Reply to Plaintiff's Response to Exxon's MSJ is referred to as "E-RMSJ." The trial court's decision is referred to as "Opinion" and citations to the Opinion are to the version attached as Appendix A to the Petition.

2. Part of Petitioner's responsibility in the ranking process was to follow company policy in the ranking procedure. Exxon policy requires that, for any employee ranked in the bottom 20% of his or her peer group, the employee's evaluation form must reflect that the employee's performance is "below most" in certain significant areas. This is not an arbitrary requirement, but rather recognition that, where an employee has been ranked below at least 80% of his or her peers, that employee's (Cont'd)

did not express her concerns about Schott to any other Exxon employees at that time. (Opinion at 13a; Pet'r Dep. 123-24, 130, 473-74, 484, 508-09, 563; Templeton Aff. at ERE 16/11.)

Templeton Offers Petitioner a Transfer to UFS

Sheila Templeton was the Manager for RAE; she was Schott's boss and Petitioner's second-level supervisor. Templeton was also a member of the Personnel Subcommittee, the group responsible for transfers and assignments within the Controllers Department. Through that committee, Templeton learned that a position needed to be filled in the Upstream Financial Services ("UFS") group, which reported to David Middlebrooks. Templeton thought Petitioner would be a good "fit" for this job because Petitioner had previously expressed a strong interest in transferring to UFS[3] and also had good analytical skills. Templeton discussed the issue with Middlebrooks and, instructed Schott to offer Petitioner the UFS position. Schott offered her the job in June 1995, but had no other involvement with the transfer. (Pet'r Dep. 132; Templeton Aff. at ERE 14-15/2-3, 5; Schott Aff. ¶ 14 at E-MSJ, Ex. 5; R 1/917.)

(Cont'd)
performance is *by definition* "below most" of the other employees. Despite the fact that two of Petitioner's employees were ranked in the bottom 20%, Petitioner had not marked them "below most" in appropriate areas and had not indicated the performance deficiencies which resulted in the low rankings. One of these employees was white and one was Asian. When Schott asked Petitioner to revise *both* of these evaluations to comply with the policy, Petitioner changed only the white employee's form. She refused to change the Asian employee's form because she had — again, contrary to Exxon policy and her supervisors' directives — already met with the Asian employee and inappropriately given her a positive performance review. (Pet'r Dep. 162-63, 170-72, 174-75; R4/349-348).

3. In fact, on one occasion when another RAE supervisor under Schott, a peer of Petitioner, was transferred to UFS, Petitioner told Schott, "I [want] to go to UFS." Petitioner also testified that UFS was a (Cont'd)

Petitioner declined the offer, stating that frequent overtime and weekend work would interfere with her need to spend weekends in San Antonio caring for her mother. (Pet'r Dep. 133, 209; *see also* E-MSJ, Ex. 8, p.3.) Petitioner seemed genuinely upset at being unable to accept the transfer. (Templeton Aff. at ERE 15/6.) Templeton said she understood Petitioner's personal situation and that she did not have to accept the transfer. (Pet'r Dep. 152-53, 192.) Instead, Jane Beaty (another supervisor under Schott) was moved into the open UFS position. (Pet'r Dep. 269; Templeton Aff. at ERE 15/7.) The transfer of supervisors from RAE to non-supervisory positions in UFS was a common practice and normal progression. (Pet'r Dep. 452-54.)

Templeton Finds Another UFS Position for Petitioner

Templeton remained alert to financial analysis assignments for Petitioner that would not require weekend and overtime work. (Templeton Dep. (Ex. P to E-RMSJ at R1/978) 63, 66.) Around October 1995 another opening came up in UFS, which Middlebrooks brought to Templeton's attention through the Personnel Subcommittee. Templeton told Middlebrooks that she "didn't have any candidates unless they could work something with [Petitioner]." Middlebrooks assured Templeton that the job in question would not require significant overtime or weekend work, and that he "felt very strongly that he could accommodate" Petitioner's need to care for her mother. Believing Petitioner had been disappointed she could not accept the June UFS offer, Templeton "recommended and, as part of the Personnel Subcommittee, approved . . . Petitioner's transfer to UFS."[4] (Templeton Aff. at ERE 16/9; Templeton Dep. 107-08.)

(Cont'd)
prestigious place to work and that it was where Exxon placed employees who were strong performers with high potential. (Pet'r Dep. 52-53.)

4. Templeton had other business reasons for transferring Petitioner, namely that there were conflicts between Petitioner and her subordinates, (Cont'd)

When Templeton told Schott of the transfer, he agreed that it was a good idea. (Schott Aff. ¶ 15 at E-MSJ, Ex. 5.) Templeton instructed Schott to "present it to [Petitioner] and present it as a done deal." (Templeton Dep. 108.) Schott notified Petitioner of the transfer and Petitioner reported to her new job in UFS. Petitioner was assigned exactly the same classification level, salary and performance ranking she enjoyed in RAE. (Pet'r Dep. 478.) Petitioner stated that at the time she considered the UFS job to be a "good opportunity" and that she was "quite happy" with the transfer. (Pet'r Dep. 180-81; *see also* E-MSJ, Ex. 8, p.3.)

Nine Months Later Petitioner Complains About the Transfer

Nine months after her transfer to UFS, in August 1996, Petitioner sought out Templeton. She was "very upset and crying" during this meeting and repeatedly asked Templeton why she had been transferred to UFS. Templeton explained that this had been an opportunity for Petitioner to move into a job in which she had expressed a strong interest, and also accommodate her need to care for her mother, the only reason Petitioner gave for declining the prior offer. (Pet'r Dep. 563-64, 573-75; Templeton Aff. at ERE 17-18/15; Templeton Dep. 133.)

In the meantime, Petitioner's manager, Peggy Brittan, noticed that Petitioner appeared to be overreacting to work issues, blowing small incidents out of proportion, and seemed

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(Cont'd)
(Templeton Aff. at ERE 16/8; Pet'r Dep. 454-55), and that Petitioner had been in her supervisory job for over three years, which was not a permanent assignment, but rather was rotational in nature. (Templeton Aff. at ERE 16/9; Pet'r Dep. 452-54.) Further, a high-performing employee was returning from family leave and Templeton felt that the she should rotate into Petitioner's spot in RAE. (Templeton Aff. at ERE 16/9; Templeton Dep. 66.)

unable to deal with criticism of her work.[5] Plaintiff testified she kept her door closed and would often cry during business hours. (Pet'r Dep. 418-19, 698-99, 776.) On August 19, 1996, Brittan contacted Liz Lawhorn, a nurse in Exxon's Medical Department, and expressed her concern. Brittan told Lawhorn that Petitioner could be under stress because she "works all week then drives to San Antonio for the weekend to care for her ill mother." Lawhorn suggested that Brittan offer Petitioner a chance to be evaluated by Medical. (Lawhorn Dep. (Ex. N to E-RMSJ at R 1/978) 24-25.)

Petitioner Brings Forward Allegations About Schott

On August 20, 1996, Templeton and Petitioner met again, this time with an HR representative (Jack Hayes) present. Petitioner was extremely upset and asked again why she had been moved to UFS. Templeton again explained the rationale for the move. Petitioner then alleged — for the first time and more than a year after the alleged incidents — that Schott had tried to drop minorities in the rankings and had made racial remarks about minority employees. She also stated that she thought Schott wanted to punish her for refusing to mark the Asian employee "below most" on her evaluation. *See* note 2, *supra*. Lastly, Petitioner told them that she was not enjoying her job in UFS and that she had been making numerous errors there. (Pet'r Dep. 563, 580-83; Templeton Aff. at ERE 18-19/16.) Petitioner's complaints about her job found a sympathetic ear in Templeton, who repeatedly asked Petitioner if she wanted to be assigned to a new position outside of UFS. Petitioner said no. (Pet'r Dep. 510-11, 583-84; Templeton Aff. at ERE 18-19/16.)

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5. Brittan had taken over for Middlebrooks as Manager of UFS. She had been informed by Templeton in August 1996 that Petitioner had made serious allegations that were being investigated, but Templeton never provided Brittan with any details. Templeton did tell her, however, that Petitioner was very emotional and that Brittan should be sensitive to that fact. (Brittan Aff. at ERE 21-22/2-4.)

Petitioner's behavior during and after this meeting was disconcerting. She stated, for example, that she "feared for her life," that "[Schott] had a brother who was a policeman and could take care of things for Gary," and that "if Gary Schott knew what she was doing he would kill her." (ERE 7-9.) After the meeting Petitioner was seen in the corner of the room shaking. (ERE 34.)

Templeton and Hayes reported Petitioner's allegations to Bobby Alexander, Exxon's Controller, who promptly began an investigation of the claims. By memo dated August 28, 1996, Alexander requested that a committee broadly investigate "this specific incident or other similar incidents involving Gary Schott." Alexander gave the investigators "the authority to review all pertinent files, documents, and records," and to "interview any witness that [they] judge to have information necessary to reach closure." Further, he told the committee to "prepare . . . a written report that assesses the legitimacy of the complaint, determines if a policy violation has occurred, and offers recommendations for remedial action." (Alexander Aff. at ERE 2/5-6, ERE 6.)

Petitioner Goes Out on Medical Leave

Petitioner continued to appear inordinately upset and in early September 1996, her supervisor and Jack Hayes of Human Resources told Nurse Lawhorn that Petitioner had been crying and was very emotional. Lawhorn met with her on September 11, 1996 to discuss her situation. (Brittan Aff. at ERE 22/6; Lawhorn Aff. at ERE 28/4, ERE 34.)

When she met with Lawhorn, Petitioner appeared sad and distressed. She said she was "unable to work without crying" and that "she believed she had a problem." Lawhorn advised Petitioner to take medical leave and contact her physician as soon as possible. Two days later, Lawhorn again consulted with Petitioner, who explained that her emotional problem was becoming obvious to her co-workers. It was clear to Lawhorn

that Petitioner was distressed, and she concluded Petitioner should take time off from work and consult with her physician. (Lawhorn Aff. at ERE 28-29/5; Lawhorn Dep. 36-37.) Petitioner was evaluated by her physician (Dr. Comfort), who diagnosed her with "Stress Disorder — Acute" and stated she was disabled and unable to work until October 7, 1996. (Lawhorn Aff. at ERE 29/7.) Petitioner was placed on paid leave during this period. (Pet'r Dep. 70, 593-94.) Petitioner admitted that all of this occurred prior to Exxon's first knowledge of Petitioner's EEOC charge on September 12, 1996. (*See* Petitioner's 5th Circuit Brief at 15.)

While on medical leave, Petitioner came to the Exxon building, asked Bobby Alexander to meet with her, and surreptitiously tape-recorded their conversation. (Pet'r Dep. 517-19, 522.) The investigation into Petitioner's complaints was underway at this point, but it had not yet been completed. Petitioner again brought up her allegations of discrimination. (Alexander Aff. at ERE 3/8-9.) Alexander made it clear that her allegations would be investigated and that Exxon would not tolerate discrimination in any fashion. He wrote down the names of the alleged victims of discrimination, told Petitioner he would personally go look at the rankings, and stated that if Schott had discriminated, "I guarantee you he will be punished." (Pet'r Dep. 552-53; Alexander Transcript R1/871-870.) Alexander's serious consideration of Petitioner's allegations is further demonstrated by the fact that when Alexander had to interrupt their impromptu meeting for a prior commitment, he asked her to wait so that they could continue their conversation. When they reconvened, Alexander made it clear that Petitioner was right to bring these allegations forward, and also made it clear that the Company was investigating her allegations because it was "the right thing to do." (Alexander Aff. at ERE 3-4/10-11, Alexander Supp. Aff. at ERE 10-13/3; Pet'r Dep. 556.)

> You keep thinking we are doing this because we have to — you are going to make us do it. That's

> not the reason we are doing it. We do it because it's the right thing to do. We do it because discrimination is wrong and we will not tolerate it and if someone makes the accusation, we are certainly going to find out whether it's true or not true. Whether you do anything or not we would. I mean, you could make one statement about the office and never say anything else and we would still investigate.

(Alexander Supp. Aff. at ERE 10-11/3.)

As in her earlier meeting with Templeton and Hayes, Petitioner made certain comments to Alexander that approached the bizarre. First, she reiterated her belief that her life was in danger. She brought up the issue of Schott's brother again, only this time she stated that, because his brother, a policeman, had actually offered to *help* Petitioner with a problem related to her mother, Schott might take some physical action *toward* Petitioner if her allegations got him into trouble. She also told Alexander that she believed her telephone line had been bugged, that she had been followed in the park, and that Exxon was behind this conduct. (Pet'r Dep. 543-44, 762-63; Alexander Aff. at ERE 4/12; Alexander Transcript R1/873-863; *see also* Pet'r Dep. 767-68 (stating Petitioner's belief that Exxon might have been poisoning her water or her air).)

Finally, Petitioner told Alexander that she was not happy working in her current assignment, whereupon Alexander (like Middlebrooks, Templeton, and Hayes before him) offered to transfer her to another section of the company, or even another affiliate, if she so desired. (Pet'r Dep. 510-11; Alexander Aff. at ERE 4/13.)[6]

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6. Both before and after Petitioner brought forward her allegations, no fewer than seven individuals offered to transfer her to another position. (Opinion at 17a.) She declined all but one of those offers, and later declined even the one offer she originally had accepted. (R4/342, fn.6.)

Petitioner Extends Her Leave, Then Returns

On the date Dr. Comfort said Petitioner could return to work, Lawhorn received a recommendation from another physician, Dr. Peake, who diagnosed Petitioner with "Major Depressive Disorder — Single Episode." Dr. Peake stated that Petitioner would be unable to work for another two to four weeks. On October 27, 1996, Dr. Peake cleared Petitioner to return to work *with no restrictions*, and she did, in fact, return. (Pet'r Dep. 594, 805-07; Lawhorn Aff. at ERE 30/9.) Both Drs. Comfort and Peak were personal physicians chosen by Petitioner. (Pet'r Dep. 22-23, 499, 593; Opinion at 5a, n.2.)

On October 18, 1996, the committee investigating Petitioner's complaints submitted its report to Alexander. The investigation team had interviewed other supervisors under Schott in an attempt to verify Petitioner's claims that he inappropriately ranked minorities and made racial comments. The team also interviewed Templeton and Schott regarding Petitioner's transfer to UFS. The investigation concluded that Schott had not discriminated against minorities in his section and that Templeton's decision to move Petitioner to UFS was neither retaliatory nor a demotion. The report did note, however, that the average ranking of minorities in Schott's section appeared relatively low, and suggested some ways to identify other problems that might have caused this to occur. (Alexander Aff. at ERE 2-3/7; *see also* E-MSJ, Ex. 2E.)

Petitioner Meets with Templeton Again

In December 1996, Petitioner went back to Sheila Templeton's office to discuss her allegations against Schott. She asked Templeton about the results of the investigation, and inquired again about the reasons for her transfer to UFS a year earlier. Templeton invited Jack Hayes to join them, and he advised Petitioner that the investigation was complete, that recommendations were made, and that action had been taken. Templeton then explained, as she had several times previously,

the reasons Petitioner had been transferred to UFS. (Pet'r Dep. 562-63, 595-605; Templeton Aff. at ERE 19-20/18; Hayes Aff. ¶ 9 at E-MSJ, Ex. 6.)

Petitioner complained again about her UFS job, stating that she was having to work weekends and was making errors. At the same time, Petitioner claimed the job was so easy a high school student could do it. (Pet'r Dep. 600-01.) Hayes and Templeton repeatedly asked Petitioner if she wanted to be transferred to a different assignment, and finally Petitioner agreed. However, when the new job was offered to her, she turned it down. (Pet'r Dep. 424-25, 434, 583-84, 602-03; Templeton Dep. 194-96; Templeton Aff. at ERE 19-20/18; Hayes Aff. ¶ 9 at E-MSJ, Ex. 6.)

Petitioner Receives Counseling About Performance Issues

On several occasions during 1997, Peggy Brittan counseled Petitioner for work-related problems, which included errors in her work, problems with her co-workers and missed deadlines. (Pet'r Dep. 697-98; Brittan Aff. at ERE 23/10.)[7] In February 1997, for example, Brittan and her boss met with Petitioner to discuss errors she had been making. They also discussed with her a co-worker's (Jane Beaty) allegations that Petitioner had inappropriately confronted her in the elevator.[8] On July 31, 1997,

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7. Prior to initiating these counseling sessions with Petitioner, Brittan first checked with the Medical Department to be sure there were no medical reasons *not* to counsel Petitioner. Since Petitioner's own doctor had cleared her to work with *no restrictions*, Brittan was instructed that there was no reason to refrain from appropriate counseling. (Brittan Aff. at ERE 23/10.)

8. Although Petitioner denied having any such confrontation with Beaty, she admitted in her deposition that she had lied about this. (Pet'r Dep. 646-48, 704-05.) Ms. Beaty, like Petitioner, had been an RAE supervisor under Schott. When Petitioner declined the first UFS transfer, Beaty was required to take the job. This is the same Jane Beaty whom Petitioner had accused of having an inappropriate personal

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when Brittan was attempting to counsel Petitioner about a deadline she had missed, she became very emotional, told Brittan that being at work was a problem for her, that no one had tried to help her, that she was only sleeping two hours per night, and that "Exxon is killing me." (Pet'r Dep. 798-800; Brittan Aff. at ERE 24-25/13.)

Petitioner Goes on Second Medical Leave for "Major Depressive Disorder"

In light of Petitioner's emotional state at their July 31st meeting, Brittan again contacted Lawhorn. Lawhorn responded that she was also concerned about Petitioner's health and wanted Petitioner to be examined by a physician. Although Lawhorn offered to refer Petitioner to an independent physician, Petitioner refused to be seen by anyone but her personal physician. (Pet'r Dep. 492-93.) Petitioner showed up at the Medical Department the following day (August 5, 1997) and was clearly distraught. She appeared "tense" and her "facial expression [was] one of agony and hopelessness." Lawhorn advised Petitioner to continue with her psychiatric care, and placed her on paid medical leave until she could be evaluated by her own physician. (Pet'r Dep. 498-500, 808-09; Brittan Aff. at ERE 25/14; Lawhorn Aff. at ERE 30-31/11, ERE 38.)

Lawhorn's determination that Petitioner was unfit for work was confirmed when, a few weeks later, Lawhorn received from Petitioner's psychiatrist a report that Petitioner had a "Major Depressive Disorder," and that she was "totally disabled." Dr. Peake predicted that Petitioner would be unable to return to work until October 15, 1997. (Lawhorn Aff. at ERE 31/12, ERE 38.)

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relationship with Gary Schott. (Pet'r Dep. 270-72.) Petitioner complains about this job even though her supervisor's close personal friend was forced to take it after Petitioner declined.

Petitioner States Desire to Return, then Abruptly Resigns

On October 13, 1997, Petitioner called the Medical Department to find out what forms she needed to complete to return to work. She said that, although she felt unable to return to work at that time, she nonetheless wanted to return to Exxon. When Lawhorn reminded her that she had a return-to-work date of October 15, 1997, Petitioner said she was going to see a new doctor on October 16, 1997. (ERE 39.) That same day, however, Petitioner wrote a note to Lawhorn stating that she wanted to be placed on vacation until the end of the month, and would call Lawhorn to set up an appointment (apparently to discuss her reentry into the workforce). She concluded the note with the statement that "[a]ny position Exxon places me [in] will be fine." (Pet'r Dep. 496-98.)

Despite her expressed desire (as recently as the day before) to return to work at Exxon, on October 16, 1997 (after being on paid leave for over two months), Petitioner came to Exxon's Medical Department and declared her intention to resign. Lawhorn asked her to reconsider, but she said she would deliver her resignation the next day. Jack Hayes, Exxon's Human Resources Advisor, then joined the meeting and both he and Lawhorn repeatedly tried to convince Petitioner not to resign. Hayes even offered again to find her another job if she wanted. Petitioner insisted on resigning, however, and the following day tendered her resignation. (Pet'r Dep. 500-01; Opinion at 18a; Hayes Aff. ¶ 10 at E-MSJ, Ex. 6; Lawhorn Aff. ¶ 14 at E-MSJ, Ex. 7.)

Based on the uncontroverted facts and upon considering extensive briefing, the district court granted Respondent's motion for summary judgment, which was affirmed *per curiam* by the Fifth Circuit after hearing oral argument.

REASONS FOR DENYING THE WRIT

Petitioner presented a remarkably weak retaliation claim, and judgment as a matter of law was the most appropriate judicial response. After a careful review of the record, the district court demonstrated in its opinion that Petitioner failed to establish essential elements of a retaliation case and, in addition, that viewing the evidence most favorably to her, there was no basis upon which reasonable persons could find in her favor.

Specifically, the persons who made the employment decision about which Petitioner complains had no knowledge of her protected conduct, a *sine quo non* of retaliation. Also, there is no evidence of a causal connection between alleged protected conduct and any employment action. Further, Petitioner's primary complaint, her transfer, was away from the supervisor who offended her and to a section she had previously requested. Moreover, on virtually every occasion when Petitioner complained about her job, Respondent's managers offered to transfer her to other jobs, other sections, even other affiliates if that would help. Petitioner testified that these offers continued until the final moment of her employment when Respondent attempted to persuade her not to resign. In short, the uncontroverted facts of this case are totally inconsistent with any theory of retaliation.

The Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S. Ct. 2097 (June 12, 2000) does not affect the outcome of the case at bar. *Reeves* held only that a *prima facie* case of discrimination, coupled with proof that the employer's asserted explanation for the challenged action was a pretext, is sufficient to avoid judgment as a matter of law. There was no question in *Reeves* that the plaintiff had made out a *prima facie* case *and* presented compelling evidence that the asserted reason for his discharge was false. 120 S. Ct. at 2104, 2106, 2110. By contrast, in the instant case Petitioner *both* failed to present a *prima facie* case of retaliation *and* failed to present evidence from which reasonable persons could find that the

reasons for the actions complained of were a pretext. Therefore, *Reeves* has no applicability here. Moreover, even if *Reeves* were assumed, *arguendo*, to be applicable, the summary judgment evidence is so overwhelming as to warrant the judgment entered for Respondent. *Reeves*, 120 S. Ct. at 2109.

I. The Holding In Reeves Does Not Affect the Soundness Of The Decision Below

A. Petitioner Extends *Reeves* Beyond its Logical and Legal Boundaries.

Reeves dealt with the narrow question "whether a plaintiff's *prima facie* case of discrimination (as defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)), combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 120 S. Ct. at 2104. The Court answered this question in the affirmative, rejecting the so-called "pretext plus" rule insofar as that would have *required* a plaintiff to present in every case not only a *prima facie* case and proof of pretext, but also something beyond these two showings in order to avoid a judgment as a matter of law. *Id.* at 2107. *Reeves*, however, did not alter the *McDonnell Douglas/Burdine* [*Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981)] line of discrimination cases (indeed it relied on those cases) and, more importantly, it did not alter the *Celotex/Liberty Lobby* line of cases which imposed upon courts a duty to grant summary judgment where the nonmovant does not present sufficient evidence for a reasonable factfinder to find in its favor on all elements of its case. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Petitioner seeks to draw from this limited holding a rule of decision that would dynamically alter summary judgment jurisprudence. Petitioner claims (Pet. at 5) that "*Reeves* established that, on summary judgment in Title VII cases, lower

courts must credit the employee's evidence establishing a *prima facie* case of discrimination and challenging the employer's 'legitimate, nondiscriminatory reasons' for the alleged adverse employment action." Of course, that is not the law. Rather, *Reeves* continues in effect the requirement that a plaintiff must present "sufficient evidence for a *reasonable* factfinder to reject the employer's nondiscriminatory explanation" in order to avoid a summary adverse ruling. *Reeves*, 120 S. Ct. at 2104 (emphasis added).

Petitioner's interpretation of *Reeves* would eliminate the possibility of summary judgment in virtually all employment cases — under such a rule any jury verdict would be unreviewable on the argument that the jury simply disbelieved the employer. This would be inconsistent with this Court's precedents holding that summary judgments are available in discrimination cases just as in other civil litigation. *Celotex*, 477 U.S. at 327; *Reeves*, 120 S. Ct. at 2106, 2109.[9]

B. *Reeves* Is Inapplicable To This Case.

Unlike *Reeves*, this is not a "pretext plus" case; indeed, it is not even a pretext case. In *Reeves*, the Fifth Circuit had found that there "very well may" have been sufficient evidence "for a reasonable jury [to] have found that the employer's explanation for its employment decision was pretextual." 197 F.3d 688, 693 (5th Cir. 1999). Contrast this to the instant case in which the trial court found no evidence — and indeed no possibility — of pretext, a decision affirmed after oral argument, by the Fifth Circuit. (Opinion (App. A to Pet.) at 13a, 17a-19a, and App. B.)

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9. The contrast between this case and *Reeves* could hardly be more stark. The plaintiff in *Reeves* produced strong evidence of discriminatory animus by the primary decision maker (including offensive statements and demeaning treatment over a period of time), compelling evidence that the employer's reason for the discharge was false, an involuntary termination and a clear *prima facie* case. 120 S. Ct. at 2104, 2106, 2109-10. Petitioner's evidence has *none* of these features.

Petitioner complains about two employment actions: her transfer in 1995 and her resignation (in spite of Respondent's entreaties to her not to resign) in 1997. These two actions occurred under different circumstances and were analyzed in detail by the trial court.

1. *Petitioner's Transfer*

Petitioner's primary claim in this case is that her transfer constituted retaliation by her supervisor, Gary Schott. The trial court found that this claim was untenable because the primary decision makers were unaware of the alleged protected conduct against Schott and therefore could not possibly have acted out of retaliatory animus. (Opinion at 13a.) Petitioner's supervisor did not have the power to effect a transfer; rather, this authority was vested in Ms. Templeton as the manager of the department and as a member of the Personnel Subcommittee. Schott was not a member of the Personnel Subcommittee, did not attend its meetings and could not make any recommendations. It is also clear that the receiving manager, David Middlebrooks, like Ms. Templeton, was totally unaware of Petitioner's alleged protected activity at the time the transfer decision was made.

Against this evidence, Petitioner cites a single reference, taken out of context, to Schott being "jointly" responsible for her transfer. (Pet. at 5.) The trial court noted Schott's tangential (at most) involvement in the transfer and set forth in detail its reasons for concluding that this involvement could not, when considered against the uncontroverted lack of knowledge of the primary decision makers and the Personnel Subcommittee itself, allow reasonable jurors to infer that Schott was somehow responsible for the decision, let alone that it was retaliatory. (Opinion at 2a, 3a, 13a.) Even the document relied upon by Petitioner makes clear that Sheila Templeton was the primary decision maker. Petitioner cites the "jointly" language from the internal EEO report of the investigation of her complaints (Pet. at 5), but fails to note the sentence immediately following:

> Templeton played the primary role in implementing the transfer because she was the department manager & the Operations Accounting representative on the Controller's personnel committee.

(E-MSJ, Ex. 2D at p. 5 (also labeled as production #EJAS-000477).)

Moreover, the district court's determination of no evidence of retaliation or pretext is strongly supported by a number of circumstances surrounding the transfer; namely:

> (1) Petitioner was transferred to a section (UFS) which she testified was seen as desirable and one to which only high potential employees with good performance records are assigned. (Pet'r Dep. 52-53.)
>
> (2) This transfer was to a job at Petitioner's same job level and compensation. (Pet'r Dep. 478.)
>
> (3) Petitioner had requested a transfer to UFS. (Pet'r Dep. 52, 240, 274; Opinion at 11a-12a.) She testified that as of November 1995, "at that point in time I had no dissatisfaction" with the UFS assignment. (Pet'r Dep. 409.)
>
> (4) This transfer took Petitioner totally out of the jurisdiction of her direct superior (Gary Schott) whom she claims was hostile toward her for her opposition to his allegedly discriminatory employment practices.[10] (Pet'r Dep. 87.)
>
> (5) In the evaluation cycle after her transfer, Petitioner continued to enjoy a robust ranking, mostly due to positive

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10. It is difficult to conceive of a set of circumstances in which a level transfer *away* from an offending supervisor could be rationally viewed as an adverse act. Imagine the stridency of Petitioner's complaint had Gary Schott stepped in to prevent the transfer arranged for her by Sheila Templeton and David Middlebrooks.

input from Gary Schott given to the reviewing supervisor after the transfer. (Opinion at fn.1; Pet'r Dep. 375-76, 380-81.) In the performance appraisal given by Schott to Petitioner just before she transferred, he gave her the highest possible rating for a number of major categories of performance including job knowledge, initiative and "supporting equal opportunity/affirmative action."[11] Schott concluded the appraisal by stating that "Jackie is [a] very dedicated and committed employee that always puts Exxon as the number one priority" and he assessed Petitioner as having the potential to be promoted at least three levels. (Pet'r Dep. 393-94.)

(6) Petitioner's primary complaint about the UFS transfer was that the job was not sufficiently challenging for her skills. (*See* Petitioner's Brief at 13, 27.) Yet Petitioner also agrees that she was making errors and not meeting deadlines in this position. (Pet'r Dep. 242, 697-98; Pet'r Aff. R 1/913-912.) Further, the scope of jobs available to Petitioner was constricted by her request that they not involve weekend or significant overtime work because she needed to care for her mother.

(7) When Petitioner finally complained about the transfer after many months, (Pet'r Dep. 434, 563, 573-74), Respondent did *not* compel her to remain in a job in which she was dissatisfied. Rather, Petitioner was offered, on numerous occasions, an opportunity to transfer to various other jobs. She declined these opportunities. (Pet'r Dep. 431-36, 510-11, 583-84, 601-03; Opinion at 17a; R4/343 at fn.4, 342 fn.6.)

(8) In dealing with Petitioner's emotional problems, Respondent was careful to follow the advice of Petitioner's

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11. *See* Ex. A-1 to E-RMSJ. In this category Schott stated about Petitioner, "the units Jackie has supervised the last couple of years have had a high percentage of minority employees. She has always treated her employees with respect and has had a very effective working relationship with them."

own-treating psychiatrists, including granting leave when requested and ordering reinstatement as soon as her physicians stated that she was capable of returning to work. (Opinion at 4a, 5a, n.1, 7a, 18a.)

(9) The *only* reason Petitioner declined the transfer to UFS when it was first offered in June of 1995 was her expressed need to care for her mother. (Pet'r Dep. 132-33, 209.) The transfer was later implemented only after Sheila Templeton and David Middlebrooks located another UFS position that could be performed while accommodating Petitioner's need to care for her mother. (Opinion at 12a; Pet'r Dep. 180-81; Templeton Dep. 86-87, 107-09.)

(10) Transfers to UFS were a routine part of the rotation for accounting supervisors like Petitioner. (Pet'r Dep. 452-53.) When Petitioner turned down the first such transfer offered to her, one of her fellow supervisors was required to take that job. This was Jane Beaty, who Petitioner alleged had a favorable relationship with Gary Schott. (Pet'r Dep. 270-72; Templeton Aff. at ERE 15/7, R1/845.)

(11) When Petitioner offered her resignation, instead of accepting it with alacrity as one would have expected a retaliatory employer to do, Respondent earnestly attempted to dissuade her from resigning and offered again to transfer her to a position she would consider acceptable. (Opinion at 18a; Pet'r Dep. 500-01.)

a. *No Evidence of Pretext in Transfer Decision*

It is clear from the uncontested facts that there is *no indication* that the employer's reason for transferring Petitioner was pretextual, let alone sufficient evidence for reasonable jurors to draw such an inference. Thus, *Reeves* is simply inapplicable to this case.

Where an employee is given a level transfer to a section that they testify is desirable, to a job that is an accommodation to their expressed need not to work overtime, and the primary decision makers are manifestly unaware of their protected conduct,[12] there is no tenable basis on which to ground a finding of pretext. Indeed, on this record even if Templeton and Middlebrooks had known of the protected conduct (which they indisputably did not), there would be no available inference of retaliatory animus or pretext on their part.

b. *No Prima Facie Case*

An additional distinguishing feature of the instant case is that unlike the plaintiff in *Reeves*, Petitioner did not even make out a *prima facie* case. A *prima facie* case of retaliation requires the plaintiff to establish (1) that he engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal connection between participation in the protected activity and the adverse employment action. *Shackelford v. Deloitte & Touche, L.L.P.*, 190 F.3d 398, 407-08 (5th Cir. 1999). Petitioner has not challenged this standard either in the fifth circuit or in this Court. This record contains no evidence of a causal connection between Petitioner's opposition to Schott's alleged inappropriate activities and her transfer, and certainly Petitioner has not fulfilled her Rule 56 obligation to produce evidence sufficient for a *reasonable* finder of fact to find in her favor on this essential element of her *prima facie* case.[13]

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12. Petitioner has *never* contended that Templeton or Middlebrooks were aware of her protected conduct when they made the transfer decision, nor could she reasonably do so since she surreptitiously tape-recorded their conversations which furnished independent proof of their lack of such awareness. (*See* Opinion at 2a, 14a.)

13. Giving Petitioner every benefit of the doubt, the district court assumed for purposes of its decision that the level transfer to UFS could be construed as an adverse act. (*See* Opinion at 10a-11a and n.4.) (Cont'd)

Petitioner has adduced no evidence of causation. She points only to her allegations regarding her supervisor which were not made until nine months after her transfer, (Pet'r Dep. 152, 489-90, 508-09, 574-75), and the transfer itself, which was to a section she had previously requested and to a job which accommodated her personal needs. Moreover, Petitioner concedes that the primary decision makers, the transferring and receiving managers (Templeton and Middlebrooks), had no knowledge of her protected activity and that when she finally complained about the new job, she was afforded numerous chances to transfer. These circumstances and others noted in Section II.B.1, *supra* are antithetical to the causation element of a retaliation *prima facie* case.[14]

2. *The Resignation*

Petitioner's second retaliation claim concerns her resignation in October 1997. This claim is even more tenuous than the transfer claim. As noted by the district court, (Opinion at 17a), the claim requires that Petitioner establish that her resignation was in reality a constructive discharge. In order to establish a constructive discharge, an employee must show that

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The court went on to note, however, that this presumption in favor of Petitioner was somewhat of an analytical reach. (*Id.*) In view of the undisputed facts of this transfer and particularly the many opportunities afforded Petitioner to move to another job or section of the Company virtually anytime she complained about her job, this transfer cannot reasonably be construed as an adverse act, which constitutes an alternative, independent and sufficient basis for the judgments from which Petitioner appeals. (*See* Respondent's Brief in the Fifth Circuit at 39-45.)

14. Alternatively and independently, the summary judgment record furnishes no potential basis for reasonable jurors to find for Petitioner on her ultimate burden, "whether, 'but for' the protected conduct, the employer would not have engaged in the adverse employment action." *Douglas v. DynMcDermott Petroleum Operations Co.*, 144 F.3d 364, 372 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 798 (1999).

the employer "made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign." *Ward v. Bechtel Corp.*, 102 F.3d 199, 202 (5th Cir. 1997). Petitioner does not ask the Court to alter this standard which is consistently applied by the federal circuits. *See* Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* at 838-46 (BNA 3d ed. 1996 & Supp. 1998) (collecting and describing constructive discharge cases from the federal courts of appeal).

This case is the antithesis of a constructive discharge. Rather than showing a company bent on making her working conditions intolerable, the evidence shows that Exxon took her concerns seriously and treated Petitioner with solicitude. For example, once Petitioner decided that the UFS position was not to her liking, no fewer than seven people offered to find her a new job.[15] (Opinion at 17a.) When Petitioner surfaced her claims against Schott, those claims were immediately brought to the attention of both Human Resources and the Controller who promptly launched a full investigation into them. Finally, when Petitioner evinced troubled behavior in the workplace,[16] her managers contacted Exxon's Medical Department for guidance.

15. When the first of these offers was made in May of 1996 by Middlebrooks, Petitioner said, "No, I don't want to go somewhere else." (Pet'r Dep. 228, 240-41.) On another occasion, Petitioner told Templeton, "the job was not the problem." (Pet'r Dep. 602-03.)

16. The district court considered Petitioner's subsidiary complaints, (Opinion at 10a, n.3 and 14a), and found that there was (1) no evidence of any connection to her protected conduct; and (2) no evidence that these uncontroversial events would not have occurred in the absence of any protected conduct. For example, Petitioner cites (Pet. at fn. 24) her February and July 1997 interactions with Brittan in support of her constructive discharge claim. Not only has Petitioner failed to submit any evidence that these events are causally connected to her EEOC charge, but she cannot show that "but for" her charge these counseling sessions would not have occurred. Petitioner testified she had no facts that support her claims that her complaints about Brittan

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Yet there is even more compelling evidence inimical to a finding that a reasonable person in Petitioner's shoes would have been compelled to resign. When Petitioner met with Templeton and Hayes in December 1996 (upon her return from medical leave), she testified that she was told she was "as respected now as [she was] before," that "no one wants [her] to quit," and that "everybody is glad to have [her] back." (Pet'r Dep. 598-99.) And when Petitioner expressed her intention to leave Exxon, both Jack Hayes and Liz Lawhorn actually asked her repeatedly *not* to resign, and Hayes offered again to find her another position. (Opinion at 18a; Pet'r Dep. 500-01; Lawhorn Aff. at ERE 31/14; Hayes Aff. ¶ 10 at E-MSJ, Ex. 6.) As the district court noted, (Opinion 18a-19a), such conduct does not constitute constructive discharge as a matter of law.

Even if Petitioner could somehow establish a constructive discharge, she would still be required to submit some evidence of a causal connection as part of her *prima facie* case and, upon the employer's articulation of a nonretaliatory reason for its action (here: "she resigned even though we begged her not to"), evidence of "but for" causation. *See Shackelford*, 190 F.3d at 403. Petitioner points to a conversation with Bobby Alexander some thirteen months prior to her resignation, one of about fifty conversations Petitioner surreptitiously tape-recorded. The district court analyzed this conversation in detail, (Opinion at 14a-17a), and found that it yielded no inference in support of Petitioner's claims. It also found that, in any event, Alexander did not make the decisions of which Petitioner complains. (Opinion at 16a-17a.) In fact, Petitioner spoke to Alexander a total of one time, over a year before her decision to resign. Note

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related to her charge. (Pet'r Dep. 491-92.) Furthermore, Petitioner admits she is speculating as to Brittan's motivation in having these counseling sessions. (*Id.* 698.) It is clear though that Petitioner agrees she was making mistakes in her job and that Brittan was concerned about her well-being when she insisted Petitioner not leave until she calmed down. (*Id.* 697-98, 799-800.)

also the incident with Gary Schott (*i.e.*, Petitioner's opposition to his alleged discrimination) occurred some two and one-half years before her resignation and that the resignation occurred approximately two years after her transfer away from Schott.

As so often happens when a conversation is secretly recorded, it is possible for the recorder to lead the other participant, and Petitioner quotes (Pet. at 8-9) some of the resulting material out of context. (*See* Alexander Transcript at R. 1/873-862.) For example, Petitioner quotes Alexander using the phrase "screwing your career up," (Pet. at 8), and conveniently leaves out the immediately previous remark where Petitioner first introduced this phrase:

> Petitioner: I just didn't want to ruin my career. And it's already screwed up, what little of it I have.
>
> Bobby Alexander: If, if you would trust me and listen to me, your career would not be screwed up. Now I'll be the first to admit I think you're screwing your career up. But it's not too late to stop it and turn it around.

(R. 1/869.) Further, during the course of this lengthy conversation, Alexander emphasized that Petitioner's allegations would be investigated thoroughly and that he would see to that personally. (*Id.* at 872, 871, 869, 866, 863.) Alexander did just that, chartering an investigation with the full authority of his office. He stated to Petitioner at this meeting:

> I guarantee you, you give me the name of the twelve people you think were discriminated against, I guarantee you I will personally look into it. We will not tolerate discrimination against anyone for any reason.

(*Id* at 872.)

> . . . [W]e are interested in helping you. And I sincerely mean that. I do not think we have discriminated against anybody. But if you give the

> names of the twelve people I will personally look into it and personally report back to you as to what I found.

(*Id.* at 871.)

No reasonable employee would feel compelled to resign after this conversation, and indeed, Petitioner did not do so for over a year.[17] Petitioner also complains, (Pet. at 10-11), about a comment Alexander made to Templeton (approximately year-end 1996) to the effect that leaving UFS early might leave a "mark" on her career. Petitioner never linked this comment to her resignation many months later and, other than her speculation, offered no evidence of any relationship to protected activity.[18] The legal principles incident to Petitioner's claim of

17. Interestingly, Petitioner never complained about Alexander to the EEOC, even though she filed an amendment to her charge shortly after her meeting with him. In her amended charge, she complained about retaliation by Ernest Terry, an African-American attorney at Exxon, and Middlebrooks. She testified that she was erring on the side of completeness in filing the amendment, (Pet'r Dep. 108-09, 267-68, 468-69), but it makes no reference to the conversation with Alexander. (*See* Ex. 8 to E-MSJ.)

18. Petitioner complains, (Pet. at 10-11), that the district court inappropriately evaluated this statement as a reasonable opinion about corporate perception rather than a threat. It should first be noted that Alexander himself never made this statement to Petitioner but rather expressed his concern to Templeton that although he personally understood Petitioner's leaving UFS early, it might be perceived by some other manager as leaving without proving she could be competitive. (Templeton Dep. 212-13.) Second, Petitioner testified that she declined the transfer in part because she was becoming more comfortable in the USF job ("I had finally gotten my feet on the ground") (Pet'r Dep. 425). Third, this alleged threat had nothing to do with Petitioner's rejection of the many other transfers offered to her. Fourth, this incident occurred almost a year before her resignation. Fifth, there was no evidence of any causal connection between this stray cautionary remark and any protected activity. Finally, the remark reflected nothing

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constructive discharge do not implicate the holding in *Reeves* which involved an *actual* discharge and judicial findings of both a *prima facie* case and strong evidence of pretext.

II. Other Reasons For Denying The Writ

A. The Just and Right Application of Rule 56

This Court's precedents teach that summary judgment "is properly regarded not as a disfavored procedural shortcut," but, rather, is an important right both to litigants and to the courts. *Celotex Corp. v. Catrett*, 477 U.S. at 327. Further, *Anderson v. Liberty Lobby* holds that the evaluation of summary judgment evidence should be viewed through the "prism" of the allegations made and the applicable burden of proof. 477 U.S. at 254.

In this case all of the available evidence supports the district court's decision. The judgment below is based predominantly on Petitioner's own testimony and on the circumstances surrounding her account. As against this, Petitioner submits nothing other than conjecture and suspicion. Petitioner's unusual perceptions of victimization should be presumed for purposes of summary judgment to be in good faith; however, they are not competent summary judgment evidence, nor could reasonable persons find in them any support for Petitioner's claims.

Further, the critical conclusions about which Petitioner complains are taken from her own testimony. The eleven items discussed in Section I.B.1, *supra* do not reflect disputed fact determinations or opinions on credibility in any sense. Rather,

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more than the view of an Exxon manager that Petitioner had the skills to succeed at the UFS position and then to continue in the next normal job rotation. (Templeton Dep. 203-04, 212-13; Opinion at fn. 1, noting that Petitioner's performance ranking remained at its previous satisfactory level throughout her tenure; Alexander Supp. Aff. at E-RMSJ, Ex. G, ¶ 6.)

these dispositive items are *based primarily on Petitioner's deposition testimony*, and therefore, Petitioner's argument that the district court "rel[ied] almost exclusively on controverted Affidavits," (Pet. at 6-7), is nonsense. These items include, notably, that Sheila Templeton and David Middlebrooks had no knowledge of Petitioner's protected conduct, that Petitioner had requested a transfer to UFS, that Petitioner was offered other jobs when she complained, and that Petitioner was urged not to resign. Thus, the district court did not weigh and balance countervailing[19] evidence, but merely noted the uncontroverted facts (or those established as a matter of law under *Celotex*) in support of its legal conclusions.

B. Other Considerations Indicated by *Reeves*

As the Court noted in *Reeves*:

> Whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, [and] the probative value of the proof that the employer's explanation is false. . . .

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19. For example, Petitioner complains, (Pet. at 7), of the district court's finding that various managers "acted out of concern for Sanders' emotional health and — most importantly — upon the orders of Sanders' physicians." Yet it is undisputed that Petitioner's physicians, not Exxon company doctors, diagnosed Petitioner as having significant emotional problems and recommended that she be excused from work during periods of treatment, recommendations that Exxon scrupulously followed. (Pet'r Dep. 67-70, 593-94.) The physicians' recommendations are in the record, (*see* ERE 11, 12, 14), and Petitioner's deposition testimony confirms both the fact and the wisdom of those recommendations. (*See* Pet'r Dep. 594, 677.) Similarly, the district court findings Petitioner complains of in footnote 23 (dealing with the meeting with Peggy Brittan) are specifically supported in Petitioner's deposition. (Pet'r Dep. 491-92, 698, 798-800; Pet'r Aff. ¶¶ 52-54 at R1/912.)

120 S. Ct. at 2109. Both of these factors strongly support the judgment below. First, the "strength of plaintiff's *prima facie* case" is nonexistent. Petitioner's theory of the case is breathtakingly improbable, requiring an assumption that persons not implicated by her allegations and without knowledge of her protected conduct engaged in a highly unlikely conspiracy against her. Petitioner's theory also requires that the multitude of evidence of employment decisions that were routine, completely explained on grounds unrelated to any protected conduct and which, in several critical instances, appear to have been *favorable* to Petitioner, were part of a malevolent plot to harm her. Petitioner is, of course, entitled to advance any scenario or theory of the case no matter how improbable;[20] however, she must offer some evidence to survive a proper Rule 56 motion. In this case she has offered nothing but speculation and suspicion ungrounded in any evidence from which reasonable persons could find that the employer's reasons for the two decisions at issue (the transfer and the resignation) were a pretext for retaliation. Thus, this second *Reeves* factor ("the probative value of the proof that the employer's explanation is false") also strongly supports the district court's careful opinion, as well as the Fifth Circuit's affirmance after oral argument.

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20. *But see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1986) where the Court relied, at least in part, on the plaintiff's relatively implausible theory of the case in evaluating "ambiguous evidence" and holding that the defendants were entitled to a judgment under Rule 56. This theme was expanded and further explained in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986): "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden" and "must bear in mind the actual quantum and quality of proof necessary to support liability." Where the substantive evidentiary burden is proof of pretext, and the plaintiff's theory of pretext is wildly improbable and speculative, the "reasonable fact finder" requirements of *Matsushita*, *Liberty Lobby*, and *Reeves* imply a closer scrutiny of the non-movant's evidence.

C. Effect of Petitioner's Theory on Other Cases

As noted in Section II.A., *supra*, if Petitioner's theory of *Reeves* is upheld, it would effectively end summary judgments in virtually all employment cases. If the extraordinarily tenuous showing made by Petitioner in this case is sufficient to withstand a judgment as a matter of law, it would discourage district courts from applying the careful Rule 56 analysis performed in this case. This will result in the trial of many cases which are simply not litigation-worthy and, more importantly, will discourage trial and appellate judges from distinguishing potentially meritorious claims from others. This in turn would undercut the credibility of the employment discrimination laws which are a critical part of modern employment policy.

CONCLUSION

The record below reflects a group of managers who were appropriately sympathetic to a troubled employee, who attempted to respond to her concerns of various sorts whenever they were expressed, and who dealt with an extremely difficult situation to the best of their ability. The summary judgment granted by the district court was not only correct as a matter of law, but under the circumstances of this case is a healthy precedent, for other companies should be encouraged to conduct themselves as positively and constructively as Respondent did in this case.

Finally, in view of all of the evidence presented in this case, the result sought by Petitioner will be of no benefit to her either, for it will merely prolong the inevitable. As various commentators have noted, one of the purposes of Rule 56 is to provide a "merciful end" to meritless litigation.[21] This case cries out for a merciful end. The petition for writ of certiorari should be denied.

Respectfully submitted,

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21. *See, e.g., Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986), *cited with approval in Celotex Corp. v. Catrett*, 477 U.S. 317, 319, n.1 (1986).

(2)

No. 00-69

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JACKIE SANDERS

Petitioner,

v.

EXXON CORPORATION d/b/a
EXXON COMPANY, U.S.A.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARGUMENT

The Brief In Opposition sets out in great detail the exculpatory evidence and possible exculpatory inferences advanced by Respondent. The inculpatory evidence and inferences are described in the Petition. We do not ask this Court to evaluate this complex record under the standards announced in *Reeves v. Sanderson*, 120 S.Ct. 2097 (June 12, 2000); that is the responsibility of the court of appeals. Because, however, the Fifth Circuit decided this case prior to and without the guidance provided by this Court's decision in *Reeves*, this case should be remanded to afford the court of appeals an opportunity to apply the correct legal standard.

The factual disputes in this case are legion.

(1) Exxon claims that Sanders' transfer from her supervisory position in RAE to UFS was a lateral move and, therefore, not a demotion.[1] However, Exxon's documents demonstrate that the UFS position was a non-supervisory, entry-level job that had been previously filled by employees with lower classifications, shorter tenure, inferior qualifications, and lesser experience than Sanders[2];

(2) Exxon claims that Sanders "requested" the transfer to UFS.[3] Yet, Exxon concedes that Sanders "declined" to transfer to UFS in June, 1995[4]; and Shelia Templeton testified that Sanders was not "particularly happy"

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[1] *See* Brief. at 17.

[2] *See* R 1/915 (and related Exhibit 2); R 2/Exhibit I; R 2/Exhibit K; and R 1/857-858.

[3] *See* Brief. at 17 ("Petitioner had requested a transfer to UFS."); at 21 ("the transfer itself...was to a section she had previously requested..."). The fact is that Sanders had. at one time, expressed an interest in UFS but had told Schott as early as 1994 that she no longer desired to work in UFS. *See* R 4/353, Exhibit 1, at 131-133.

[4] *See* Brief. at 3, 19.

with being forced to transfer there in November, 1995[5];

(3) Exxon claims that Sanders' transfer from RAE supervisor to UFS could not have been a retaliatory demotion because Gary Schott played no role in the transfer and the "primary decisionmakers" were unaware of Sanders' opposition to Schott's alleged discrimination.[6] Yet, Exxon's own EEO investigative report states that Schott **"jointly"** decided to transfer Sanders to UFS; told his boss, Shelia Templeton, that "they needed to work the move" for Sanders; and that it was a "conscious effort"[7];

(4) Exxon claims that, even assuming Sanders' transfer constitutes a demotion, the transfer was motivated, not by retaliation, but by legitimate "business reasons": Sanders' "conflicts" with her subordinates; the "rotational" nature of Sanders' position; and the need to place a "high-performing" employee who was returning from family leave.[8] Yet, Schott conceded that Sanders' purported "conflicts" with her subordinates were "no different than what most supervisors go through."[9] Moreover, Exxon did not "rotate" Sanders' RAE counterpart, Darrell Call, who was the subject of a Title VII lawsuit against Exxon for sex and race discrimination and had been

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[5] *See* R 1/978, Exhibit N, at 109.

[6] *See* Brief, at 2 ("Schott offered her the job, but had no other involvement with the transfer."); and at 20 ("the primary decisionmakers...had no knowledge of her protected activity...").

[7] *See* R 1/847, 849-850 (emphasis added). In light of such clear documentary evidence, Shelia Templeton's testimony that she could recall no conversations with Schott concerning Sanders' transfer *See* R1/978, Exhibit N, at 107-108, is incredible and, thus, further underscores pretext.

[8] *See* Brief, at 3 n. 4.

[9] *See* R 1/1060-1061.

repeatedly cited by the company for being "inflexible and difficult to deal with..."[10]

(5) Exxon claims that it conducted a "full investigation" of Sanders' allegations concerning Schott's discrimination against the minority accountants.[11] Yet, it is undisputed that Exxon failed to interview any of the six minority accountants whom Sanders had identified as Schott's victims[12];

(6) Exxon claims that its "sympathetic" actions towards Sanders were the model of corporate "solicitude" and the "antithesis" of constructive discharge.[13] However, it is undisputed that, after Sanders opposed Schott's discrimination, Exxon relegated her to an entry-level job, substantially reduced her pay and, over its own nurse's directive,[14] repeatedly subjected her to "hard counseling"[15];

(7) Exxon claims that, in their September, 1996 conversation, its Controller, Bobby Alexander, did not attempt to coerce Sanders regarding her EEOC Charge and that, in any event, Alexander played no role in any of Exxon's allegedly retaliatory actions.[16] The September, 1996 conversation speaks for itself. As for Alexander's alleged non-decisionmaking role, Shelia Templeton testified that, in January, 1997

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[10] *See* R/1083 (Exhibit B and Exhibit C).

[11] *See* Brief, at 22.

[12] *See* R 2/Exhibit 0, at 39-43.

[13] *See* Brief, at 22.

[14] As evidence of its "solicitude" for Sanders, Exxon points to the fact that Sanders' supervisors consulted the medical department for "guidance" in dealing with her. *See* Brief, at 22. Yet, Exxon neglects to inform the Court that Exxon's nurse's (Liz Lawhorn) believed that management was "coming down hard" on Sanders and instructed it to "loosen up" on her. *See* R 1/978, Exhibit P, at 91-92.

[15] Under well-established case law, such conduct is the quintessential constructive discharge. *See*, e.g., *Barrow v. New Orleans Steamship Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

[16] *See* Brief, at 23.

Alexander not only vetoed his subordinates' recommendation to allow Sanders an unconditional transfer from UFS but directed them to subject Sanders to "hard counseling"[17];

(8) Exxon claims that Sanders was a "troubled" employee who required counseling for "performance issues."[18] Yet, Exxon did not begin documenting Sanders' alleged "errors" or subject her to counseling for "performance issues" until **after** she filed her EEOC Charge.[19] Over the preceding nineteen years, Exxon promoted Sanders five times and considered her one of its "highest potential" employees.[20] Moreover, Dan Jones—Sanders' immediate supervisor in UFS—testified that Sanders was a "hard worker," "knowledgeable," "eager to take no new challenges and responsibilities," and had significantly improved the efficiency of her UFS position;[21] and despite being Sanders' first-line supervisor, he did not participate in any of Exxon management's "hard counseling" sessions[22];

(9) Exxon claims that it made Sanders "seven" offers to transfer from UFS[23] and "earnestly" "begged" her not

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[17] R 1/854; R 1/978, Exhibit N, at 213, 215.

[18] *See* Brief, at 10.

[19] *See* R 1/978, Exhibit O, at 144-145. Exxon misrepresented to the Court that, in her Fifth Circuit brief, Sanders conceded that the company did not know about her EEOC Charge at the time its alleged retaliation commenced. *See* Brief, at 7 ("Petitioner admitted that all of this occurred prior to Exxon's first knowledge of Petitioner's EEOC charge on September 12, 1996."). Sanders' Fifth Circuit brief, at 15, states exactly the **contrary**—a point that Exxon's counsel has effectively acknowledged in a recent letter to Petitioner's counsel. Indeed, it is undisputed that Exxon learned about Sanders' EEOC Charge **before** it placed her on medical leave the first time.

[20] *See* R 1/921; R 1/978, Exhibit N, at 79.

[21] *See* R 1/978, Exhibit O, at 192-193.

[22] *See* R 1/978, Exhibit O, at 87.

[23] *See* Brief, at 8 n. 6.

to resign.[24] However, it is uncontroverted that Exxon presented Sanders with only one, conditional transfer offer: the "Catch-22" authorized by Bobby Alexander in January, 1997.[25] Exxon's request that Sanders not resign came months after the company demoted her, induced a nervous breakdown through "hard counseling," barred Sanders from the workplace, and placed her on medical leave for a second time.

(10) Exxon insinuates that Sanders' "emotional problems" were, in no way, connected to its hostile work environment.[26] However, prior to Exxon's demotion and harassment, Sanders had never required psychological or psychiatric treatment.[27] Additionally, Sanders' psychiatrist diagnosed her as suffering from depression connected with Exxon's alleged retaliation.[28]

CONCLUSION

As the foregoing illustrates, the parties vigorously dispute numerous material facts in this case. Acting prior to *Reeves*, the District Court and the Fifth Circuit applied the very standards *Reeves* has now proscribed. That is, the lower courts not only failed to credit much of Sanders' evidence but weighed the evidence they did credit, construed all reasonable inferences from that evidence against Sanders, and then, relying in large part on Exxon's self-serving testimony, resolved the factual disputes in the company's favor. In the process, the lower courts applied the "pretext plus" standard rejected by *Reeves*. As a result, Petitioner now requests that the

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[24] *See* Brief, at 19, 23.
[25] *See* R 1/978, Exhibit N, at 207-217.
[26] *See* Brief, at 11, 18-19.
[27] *See* R 1/911.
[28] *See* R 1/948, Exhibit E.

Court grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in the light of *Reeves*.

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